DEFENSE LEGAL POLICY BOARD

REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES

Military Justice in cases of U.S. Service members alleged to have caused the death, injury or abuse of non-combatants in Iraq or Afghanistan

FINAL REPORT

May 30, 2013

This report is a product of the Defense Legal Policy Board (DLPB). The DLPB is a Federal Advisory Committee established to provide independent advice to the Secretary of Defense. Statements, opinions, conclusions, and recommendations in this report do not necessarily represent the official position of the Department of Defense.

The DLPB Subcommittee on Military Justice in Combat Zones completed its information gathering in April 2013.

This report is UNCLASSIFIED and releasable to the public.

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JUN 14 2013

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: Military Justice in Combat Zones

I am pleased to forward the advice and recommendations of the Defense Legal Policy Board (DLPB) and the report of the Subcommittee of this Board established to review and assess the application of military justice to Service members alleged to have committed offenses against civilians in combat zones. The Subcommittee fully and comprehensively addressed the issues and questions contained in the Secretary of Defense's memorandum of July 30, 2012. Subject to the discussion below, the Board concurs with the recommendations of the Subcommittee and strongly encourages the Department to direct their implementation. Taken together, the recommendations in this report will help prevent reporting and investigation problems that occurred in certain cases, such as Haditha, which gave rise to this review. Implementing the recommendations should also improve U.S. military response mechanisms and thus significantly reduce the negative impact such cases have on combat missions and the achievement of U.S. policy goals. In some instances, implementation will require statutory changes to the Uniform Code of Military Justice (UCMJ), changes to the Executive Order promulgating the Manual for Courts-Martial, and changes to long-standing Service military justice cultures to conform them to the evolving needs of joint combat operations. Follow-through by the Department will be the key to insuring that hard-learned lessons, best practices and necessary reforms are in place for any future conflict.

The stress of combat affects the ability of individuals, units and institutions to accomplish their missions, and respond to incidents and events. The counterinsurgency (COIN) missions that have characterized the conflicts in Iraq and Afghanistan compound the stress of combat. These missions require our Service members to operate alongside, and frequently interact with, the civilian community as well as host nation forces. Service members are often tasked with conducting difficult and complex missions that differ greatly from the kinetic combat operations for which they have historically been trained. When incidents involving the death, injury or abuse of civilians occur in combat, they have the potential to become great flash points, possibly undermining the mission and endangering the force.

The military justice system is not immune from the complexity and difficulties involved in a counterinsurgency mission. The protracted conflicts in Iraq and Afghanistan have not only stressed the fighting force but have also tested the deployed military justice system. Challenges associated with frequently rotating units, limited access to crime scenes and witnesses due to host nation culture, along with limited forensic and investigative assets in theater, have made deployed military justice markedly more challenging than the provision of military justice services in garrison. The existing military justice system, however, has proved resilient and flexible in the deployed environment. With a few exceptions, it has adequately served the needs of commanders to preserve good order and discipline while also serving to protect the rights of

both accused and victims in the most challenging of circumstances. Fair, efficient, and transparent resolution of cases and allegations will always be the goal for cases arising in a combat zone as it is anywhere else in the world.

While this review found areas for improvement, it did not find a pattern of problems indicating a need for sweeping reform. The system created by the UCMJ has generally withstood the test of time for over sixty years. During the last ten years of conflict our Nation has learned many lessons and developed many "best practices" for application of that system under arduous combat conditions. These lessons and best practices must be preserved and captured in doctrine, regulations, and procedures to avoid the painful process of "re-learning" them in future conflicts, while allowing their flexible application to the particular operational circumstances of future conflicts. The recommendations and reforms contained in the report will further advance the effective practice of military justice in combat zones, improve deliberate planning for civilian casualty prevention and response, and ensure our system remains fair, credible, and dependable. [1]

Several particular points and recommendations in the report warrant emphasis and further discussion, and are addressed below.

Joint Military Justice

The U.S. military fights as a joint force, but military justice is still predominantly aligned along traditional Service lines of authority. Military justice is more than just a criminal law system; it is a tool of the commander to preserve good order and discipline, and an essential component to fielding an effective and well-disciplined force. The role of the commander is central to a fair and effective system of justice for the armed forces. In a combat zone or a COIN environment, the importance of this role is magnified further; maintaining good order and discipline affects not only the force, but also relationships with the host nation. Major General Vaughn Ary, Staff Judge Advocate to the Commandant of the Marine Corps, captured the importance of this role in his testimony before the Board on January 22, 2013:

> In a combat environment, noncompliance with rules and undisciplined operations cost lives and negatively impacts the mission. Even culturally insensitive actions can escalate the level of violence for our combat forces, serve to further alienate the local civilian populace and lead to strategic setbacks to our national interests. For these reasons, the commander must maintain the central and preeminent role in our military justice system.

Commanders use their military justice authority to ensure the fair and prompt resolution of allegations that could undermine host nation relationships and negatively affect U.S. policy goals. Balancing these varying interests is an integral aspect of command authority and should rest with the commander ultimately responsible for the theater of operations; the joint commander. The joint commander should affirmatively determine the manner in which military

[1] We note that an Independent Panel has been created to address response systems to adult sexual assault crimes under the UCMJ. This Board did not address that issue; our mandate related exclusively to offenses against civilian non-combatants in deployed areas and combat zones.

justice will be administered for forces under his or her command and not reflexively defer to Service component commanders. In the joint commander's discretion, circumstances may lead to the affirmative determination that delegation to Service component commanders is appropriate or to withholding authority at the joint command. The authority of the joint commander over military justice is not clearly and consistently established in current doctrine and policy. Moreover, the joint commander does not have the tools and resources to effectively carry out a military convening authority role. This needs to change.

The Board notes that one Board member (also a Subcommittee member) recommended a thorough examination of the role of commanders as convening authorities. He recommended removing, throughout military justice practice, commanders' authority to decide which cases should be tried by courts-martial and moving this authority to legally trained directors of military prosecutions. In his discussion, found at Appendix VI of the Subcommittee's report, he argues that many other democracies have gone this route. This view was not shared by the other Subcommittee members or the rest of the Board. The record developed by the Subcommittee and the Board contained substantial evidence regarding the essential role commanders must play in the COIN environment and that, overall, military justice authority has been notable for careful and judiciously applied discretion in deployed combat areas. The Board concluded that a major reorientation of the military justice system, while perhaps worthy of study, would have broad impact on all aspects of military justice and would raise significant issues outside the scope of the Board's mandate. A majority of the Board strongly believes that during deployed combat operations it is essential that the commander responsible for the conduct of that fighting force possess the authority to fully address conduct that is prejudicial to good order and discipline arising in combat zones.

Holistic Approach to Civilian Casualties

The Board strongly supports the Subcommittee's recommendation to require that all civilian casualties be reported to senior commanders in COIN or similar operating environments. This recommendation captures lessons learned during the course of combat operations in Iraq and Afghanistan and will yield significant benefits in the prevention of and response to civilian casualty incidents. Through the course of combat operations in Iraq and Afghanistan, the U.S. and Coalition approach to prevent and respond to civilian casualties underwent considerable development, but this development has not been captured in permanent Department direction or guidance. Significant for this review, due to the serious potential impacts on their military operations, theater commanders eventually required reports of all civilian casualties. These incidents were subject to initial inquiries, and further investigation via administrative means or by one of the military criminal investigative organizations, as appropriate. This requirement proved beneficial in minimizing the adverse effects of these incidents as well as increasing trust and cooperation in the reporting, investigation and disposition of allegations among our forces, local populations and civil authorities. This approach should be captured in joint doctrine as a planning consideration for all future conflicts. As part of the deliberate and crisis planning processes, commanders should affirmatively address civilian casualty prevention and response, adopting reporting and investigative processes appropriate to the envisioned operations, and ensuring the required resources and infrastructure are in place. Consideration of how to prevent,

report and respond to civilian casualties should not be an afterthought, addressed only after the conflict has unfolded.

UCMJ and Military Justice Reforms

Prosecutions of multiple defendants tried at the same trial for related offenses are very common in Federal and state criminal practice, but are rarely seen in courts-martial. Such joint trials have the potential to benefit the military justice system by minimizing the expense and the time commitment for witnesses and personnel supporting the trial, and ensuring that all accused are treated equally. In a combat zone this may be particularly significant when access to victims and local witnesses is often limited and military witnesses and members may need to be pulled from units actively engaged in the fight to support the judicial process. Moreover, a joint trial can limit victim impact by preventing repeated testimony about traumatizing events. While the Rules for Courts-Martial (RCMs) in this area are similar to those found in the Federal Rules of Criminal Procedure, the commentary associated with the RCMs, and many years of practice, have made joint trials practically non-existent. This is an area ripe for change in military justice practice. Joint trials are constitutionally permissible, and can be efficient and effective; their use should be allowed and encouraged when the circumstances of a case make it appropriate. Review and revision of the RCMs where necessary, and direction, training and emphasis by staff judge advocates and other senior judge advocates even before RCM changes, can make this happen while ensuring fairness for accused military members.

The Board agrees with the Subcommittee that contractor misconduct in deployed environments has significantly complicated the commanders' ability to preserve good order and discipline, and undermined the COIN mission. A majority of the Board endorse the recommendation to amend Article 2 of the UCMJ to expand jurisdiction to all U.S. contractors operating in a U.S. commander's battlespace. Other members of the Board believe that it is more appropriate to prosecute civilian contractors in federal courts and that the Military Extraterritorial Jurisdiction Act should be amended to ensure that this is possible. All members strongly endorse action by the U.S. government to ensure there are no gaps to federal jurisdiction over misconduct by all U.S. contractors, and no impediments to the effective and efficient exercise of this jurisdiction.

The Board concurs with the Subcommittee's findings on the importance of investigations under Article 32 of the UCMJ, as a process to protect the rights of Service members and inform the decisions of convening authorities. At the same time, the Board also concurs with the discussion indicating that Article 32 investigations at times become unwieldy and can inappropriately become "mini-trials." The Board supports the Subcommittee's recommendation for enhanced training for judge advocates and investigating officers to establish standards for what is and is not required for these investigations, and facilitate the proper exercise of discretion by investigating officers to limit Article 32 investigations to their appropriate functions. To be effective, implementation of this recommendation will require strong personal engagement by staff judge advocates and other senior leadership within the respective judge advocate communities.

Military Ethos, Battlefield Ethics and the Law of Armed Conflict

Senior commanders, both serving on the Subcommittee and providing testimony, identified training for all personnel on the military ethos, battlefield ethics, and the law of armed conflict as the single most important action commanders can take to prevent civilian casualty incidents and encourage reporting by members when incidents occur. Fostering and maintaining an ethical climate within deploying units requires focused training throughout pre-deployment and deployment cycles, continually reinforced by leadership through mentoring and direct engagement with the troops. Such training should be expanded and tailored as part of deliberate planning for operational commitments, and actively continue throughout deployments. The benefit of this training in preventing incidents, encouraging reporting and investigation, and, when necessary, disposing of allegations through the military justice system, is well worth the investment.

The Board and Subcommittee received testimony from commanders, lawyers, investigators, non-governmental organizations, and academia. The Board also received moving testimony and submissions from family members of Service members convicted of offenses in Iraq and Afghanistan. We appreciate their coming forward to discuss such difficult topics in a public forum. The Board has not passed judgment on the results of military justice in particular cases, but the Subcommittee nonetheless considered some systemic concerns raised by these family members and addressed some of them in the Subcommittee's recommendations and areas recommended for further study. The Board thanks everyone who provided testimony for their insight and expertise as well as the passion they have for our Service members and the military justice system. We further thank the Staff and the Service Advisors for their tireless efforts in support of this review.

Judith Miller

Judith A. Miller
Chair

cc:
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff
General Counsel of the Department of Defense

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MAY 30 2013

MEMORANDUM FOR THE DEFENSE LEGAL POLICY BOARD

SUBJECT: Report of the Subcommittee on Military Justice in Combat Zones

Attached is the final report of the Subcommittee established to review and assess the application of military justice to Service members alleged to have committed offenses against civilians in combat zones.

The report provides important recommendations for the Department on civilian casualty prevention and response that will improve training, reporting and investigation in this area. Recommended improvements to military justice practice will spur the continued development and improvement of military justice in forward deployed areas and help ensure the system remains efficient, fair, dependable and credible.

In forwarding this report the Subcommittee would like to acknowledge and thank the staff and our Service legal advisors for their tremendous support throughout this review. Their knowledge, experience and hard work greatly enhanced the quality of this report. Additionally, the Subcommittee would like to thank the witnesses who provided testimony and our sessions, and everyone who submitted written comments for our consideration. These contributions played a key role in shaping our recommendations for the Department of Defense.

Judith A. Miller
Subcommittee
Co-Chairman

Walter B. Huffman
Subcommittee
Co-Chairman

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1.0 Executive Summary

1.1 Introduction

On July 30, 2012, the Secretary of Defense ("SecDef") established this Subcommittee of the Defense Legal Policy Board and directed it to review and assess the application of military justice in combat zones in cases in which Service members were alleged to have committed offenses against civilians. While this report does not pass judgment on the results of particular cases, this review was prompted by various instances of alleged misconduct by U.S. Service members which caused civilian non-combatant casualties in Iraq and Afghanistan. SecDef noted that these situations are rare overall, but are nonetheless "huge flash points" which have the potential to undermine our mission and seriously impact host nation relations if not handled properly. The Subcommittee's review focused on six specific questions raised by SecDef in his memorandum, a copy of which is provided in Appendix 1 to this report and summarized in Table 1 below.

The Subcommittee's findings and recommendations are at Section 4.0 of this report. The recommendations are also listed in Appendix III.

1.2 Subcommittee Membership and the Secretary of Defense's Questions

The Subcommittee, listed in Appendix 2, is composed of senior retired military commanders with extensive combat experience, well-respected law enforcement personnel, and numerous distinguished attorneys with broad experience in military service, government work, private practice, and legal academia.

Table 1. Summary of SecDef's Questions

1. The manner in which such alleged offenses are initially reported and investigated; are there ways to ensure that alleged offenses are reported and investigated promptly, thoroughly, and accurately? Are there ways to improve cooperation with local law enforcement and local communities?
2. The command level at which the initial and final disposition authority now resides in such cases; is it at the right levels, or should the disposition authority be withheld to a different level?
3. In joint, deployed areas, should military justice be pursued within the joint force, utilizing joint resources, rather than having cases handled separately and within each component service?
4. In deployed areas, are resources adequate for the investigation of offenses and the administration of military justice?
5. Should the system of military justice be revised in some manner to improve the way in which cases involving multiple defendants are handled? In cases involving multiple defendants, should the system be revised in some manner to better secure the testimony and cooperation of those involved in the offense? Are there lessons to be learned from the civilian system?
6. Does the military justice system in deployed areas fully preserve the rights of the accused, while also respecting the rights and needs of victims and witnesses?

1.3 Overview of Subcommittee Study

The Board and Subcommittee received testimony from a number of commanders who served in Iraq and Afghanistan at the battalion, brigade, and division levels. Additionally, the Board and Subcommittee heard from the Judge Advocates General of each Service, the heads of the Military Criminal Investigative Organizations ("MCIOs"), a number of attorneys with a variety of subject matter expertise, concerned members of non-governmental organizations and academia. The Board and Subcommittee also received testimony and

submissions from the families of Service members convicted of offenses involving the death, injury or abuse of civilian non-combatants in Iraq and Afghanistan.

In addition to live testimony outlined above, the Board and Subcommittee received written matters from the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, Commander, U.S. Central Command and many other interested parties. These individuals are listed in the preface of this report and we thank them for their outstanding support and insightful input to our analysis. While it is clear to the Subcommittee that over ten years of combat in Iraq and Afghanistan has stressed our Services, our Service members, and our military justice system, overall, the Uniform Code of Military Justice ("UCMJ") has provided commanders the means and methods to administer justice effectively across the spectrum of operations in both Iraq and Afghanistan. The Subcommittee's review found that with rare exception, Service members alleged to have committed offenses during combat operations over the past decade, including civilian casualty offenses, have been dealt with fairly and efficiently - their rights preserved throughout the process.

That said, the last ten years of combat operations have revealed areas in need of improvement that are outlined herein. Similarly, the Subcommittee has discerned many "best practices" used by forces and commanders responding to the challenges of the counterinsurgency ("COIN") mission. This report addresses the areas that can be improved upon as well as the best practices that it recommends be captured in doctrine for possible use as appropriate during future conflicts.

1.4 Role of the Joint Commander

Throughout the Subcommittee's review and assessment a prevalent theme emerged – the need for the joint commander to have a central role in the administration of military justice in a theater of operations. While good order and discipline is important and essential in any military environment, it is especially

vital in the deployed environment. The military justice system is the definitive commander's tool to preserve good order and discipline, and nowhere is this more important than in a combat zone. A breakdown of good order and discipline while deployed, especially in a COIN mission, can have devastating effects on mission effectiveness. The joint commander is ultimately responsible for the conduct of his force. As such, the Subcommittee has determined that the joint commander must have the authority and apparatus necessary to preserve good order and discipline through the military justice system. Through the UCMJ, the deployed commander can effectively dispose of allegations of misconduct, while preserving the rights of accused Service members and also providing a sense of justice to victims and host nations. This Subcommittee finds that the joint commander should be the center of military justice administration in an area of operations. That said, the application of deployed military justice appears to be overly cumbersome for the joint commander. The Subcommittee found that barriers exist in the reporting process, the investigative process, and in case resolution. Commanders appearing before the Board and Subcommittee were unanimous in their belief that to preserve good order and discipline within their area of operation effectively, the joint commander must have the authority and means to exercise control over all forces, from every Service.

This authority may be delegated to Service leads in a manner the joint commander determines is appropriate for his area and mission, but final authority rests with the commander with the ultimate responsibility – in this context, the joint commander. The Subcommittee strongly recommends changing the existing joint doctrine default that allows disciplinary authority to be exercised by Service component commanders and instead specifying in joint doctrine that discipline is the responsibility of joint force commander. With that, the Subcommittee's findings and recommendations aim at ensuring the joint commander has the authority, training tools, and resources available to administer military justice properly in the deployed environment. The recommendations highlighted below encompass training, reporting, investigation, and case resolution. Each has the common goal of fostering ethical conduct,

encouraging prompt reporting of allegations and thorough investigation, and when necessary, supporting the fair and efficient processing of cases through the military justice system. The recommendations will enable and support a commander-driven military justice system preserving both good order and discipline within the joint fighting force as well as justice for the accused.

- Continue to train and expand battlefield ethics / lessons-learned training curriculum extrapolated from after action reports (*e.g.* civilian casualty reporting, law of armed conflict ("LOAC"), military ethos, command climate), during all levels of professional military education ("PME"), formal and informal schooling, exercises, and unit training.

- Whenever possible, especially in COIN operations, doctrine and deliberate planning should require notice of civilian casualties to senior operational commanders immediately or as soon as circumstances permit, in a manner prescribed by the senior joint force commander.

- Especially in COIN operations or other suitable operational environments, and tactical considerations permitting, doctrine and deliberate planning should require commanders to conduct an uncomplicated, prompt, initial fact-finding inquiry, consistent with operational conditions, in civilian casualty cases to determine the readily available facts, likely cause, and extent of U.S. or coalition force involvement.

- Joint doctrine and planning guidance should address MCIO support that provides timely and effective investigation processes to sensitive and high profile incidents such as civilian casualties in the current or anticipated operational environment.

- Amend the Manual for Courts-Martial ("MCM") to strike the preference for liberal treatment of motions to sever, detail the advantages of joint trial, particularly in the deployed environment, and provide guidance for joint trials respecting individual rights even when co-accused elect different forums.

1.5 Training

A moral, principled, ethical command combat climate that inculcates and preserves U.S. values, despite mission difficulties or the particular area of operations, is of paramount importance. Individual leaders at all levels have a significant responsibility in this regard. There is no substitute for ethical leadership manifested first by the provision of training in garrison and then underscored and emphasized throughout deployments. Such training should demonstrate ethical responses to civilian casualty cases, including incident reporting and investigations. Moreover, leaders must work hard to engender trust within their units that civilian casualty investigations are used to determine facts and will often serve to protect soldiers instead of just uncovering misconduct or assigning blame. Such command emphasis and mentoring, particularly at the junior ranks, will greatly help to enable Service members to overcome inclinations to put small unit/member loyalty above loyalty to their Service and its core values.

The Subcommittee recommends the Services continue to train and expand battlefield ethics / lessons-learned training curriculum extrapolated from after action reports (*e.g.* civilian casualty reporting, LOAC, military ethos, command climate), during all levels of PME, formal and informal schooling, exercises, and unit training.

1.6 Reporting

Prompt civilian casualty reporting can mitigate many problems which will arise if reporting is otherwise delayed. While everything is more challenging in a combat environment, timely reporting will potentially preserve physical evidence, better tap into the fresh recollection of witnesses, and also immediately address the concerns of the local population. In criminal cases, prompt reporting and quick action to investigate will be the key to a successful prosecution. The Subcommittee recommends that whenever possible, especially in COIN operations, doctrine and deliberate planning should require notice of civilian

casualties to senior operational commanders immediately or as circumstances permit, in a manner prescribed by the senior joint force commander.

1.7 Investigations

The timely reporting of allegations to commanders ensures that the commander can quickly assess a situation and direct the appropriate level investigation as the situation dictates. The commanders appearing before the Board and Subcommittee consistently expressed the importance of investigating all allegations of civilian casualty cases, regardless of source, because even allegations from questionable sources may have a basis in fact. Investigating all allegations, regardless of source, also greatly assists in dispelling the numerous unfounded allegations that often arise in deployed settings. Documenting all alleged civilian casualty cases, especially in low intensity or COIN environments, allows commanders to determine the facts reliably; dispel false claims; correct operational shortcomings; provide effective prompt restitution to victims; address misconduct; promote uninterrupted operations; and provide transparency at all stages of combat operations. To institutionalize the merits of initial inquiries, the Subcommittee recommends that doctrine and deliberate planning guidance require commanders to conduct prompt, initial fact-finding inquiry, consistent with operational conditions, in civilian casualty cases.

Commanders cannot, however, always act alone to investigate allegations of civilian casualties. They often require the assistance of the MCIOs to sift through the facts involved in civilian casualty cases involving suspected criminality. MCIOs are uniquely independent in their investigative discretion, but are also an invaluable resource to commanders for investigations and for keeping commanders informed of case developments. That said, the Subcommittee found that the differences between the Services regarding commander authority over MCIOs, and MCIO independence, is a source of confusion for commanders. It is critical for a joint commander to understand how and when MCIO resources from different Services can be used in an area of

responsibility. MCIO-command relationships should be clear in a Joint environment and not Service-dependent. MCIOs must be responsive to the investigative needs and priorities of the joint force commander, without diminishing the existing authority of the Service Secretaries. Therefore, the Subcommittee recommends that joint doctrine and planning guidance address MCIO support to provide timely and effective investigation processes during sensitive and high profile incidents, such as civilian casualties, in anticipated operational environments.

1.8 Case Resolution Process

Once an incident is reported and investigated, joint commanders need the resources, assets, and tools to resolve the case adequately. Throughout the conflicts in Iraq and Afghanistan, the individual military Services have managed military justice for their own members despite operating in joint environments. As military operations and missions become more joint, the joint commander must have sufficient resources to execute military justice authority across the joint force. The resourcing of joint staffs and joint task forces should be reviewed to determine how to support the joint commander best. Service component support should also be reviewed. Such a review should consider alternatives for supporting joint convening authorities, to include assignment or temporary attachment of personnel to the joint headquarters, and the designation of a Service component to support the joint commander.

Cases involving death or serious injury to civilians in combat environments tend to be complex and lengthy due to investigative, evidentiary, and witness challenges, and sheer increased logistical difficulty of operating in a combat environment. Trial resources should be aligned to support the deployed commander better. Leveraging assets is especially important in a joint environment as it optimizes the joint commander's ability to administer joint deployed military justice effectively. The joint commander should be able to call

on established litigation resources, across Services, to support the prosecution and defense of complex civilian casualty cases, or similar high profile cases.

Cases involving civilian casualties often involved a group of suspected Service members. Trying each accused Service member separately poses many difficulties in the deployed environment, including witness availability, requiring a local victim to testify multiple times, and the seeming delay in justice to the local population. Conducting joint trials can have many benefits in the deployed environment. There can potentially be a reduction in time and cost to try cases, as well as possibly avoiding multiple witness appearances. Joint trials may also spare victims from having to testify on repeated occasions. The federal system currently favors joint trials, but the MCM provides that an accused Service member's request for severance should be liberally construed. To give deployed commanders increased flexibility to try accused Service members together, the Subcommittee recommends that the MCM be amended to strike the preference for liberal treatment of motions to sever and allow prosecutors the discretion to examine the facts and circumstances of individual cases to determine when and if a joint trial is desirable. Such factors must also include consideration of individual accused rights when co-accused elect different forums.

1.9 Conclusion

The military justice system has been an effective commander's tool for good order and discipline in Iraq and Afghanistan, but the experiences in these conflicts have shown there is room for improvement to ensure more effective and flexible dispensing of military justice in future conflicts. The challenges associated with cases arising in a combat environment involving foreign national witnesses and victims, are daunting, but not insurmountable. Capturing best practices and crafting thoughtful reforms drawn from the experience and lessons learned in these conflicts will advance the quality and responsiveness of military justice practice. All commanders must affirmatively plan for civilian casualty prevention and response, to include how they will exercise, delegate and staff the

deployed military justice mission. A holistic approach to civilian casualty prevention and response, particularly in a COIN environment, yields benefits to the force, the mission and the host nation and is intertwined with a commander's UCMJ authority. Accordingly, to continue to be an effective tool in future conflicts, and support the joint commander responsible for achieving U.S. policy goals, the joint commander must have a central role in the system of justice. In a deployed setting, the military justice system must be commander driven and our doctrine and practices must support and advance this role.

This Subcommittee provides a number of recommendations to ensure that the military justice system remains efficient, fair, dependable, and credible. These recommendations and the discussion that follows were made after careful, thoughtful consideration. They are intended to enable the joint commander, recognize the increasingly joint nature of military operations, ensure the rights of accused Service members, and also recognize the rights and interests of our host nations. While these recommendations were made in the context of Iraq and Afghanistan, they should not be considered as applicable only to COIN operations, but applied to any future conflict in a manner appropriate to the anticipated scope and tempo of operations.

2.0 Preface

SecDef established the Defense Legal Policy Board ("DLPB" or "the Board") on April 2, 2012, pursuant to the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix), the Government in the Sunshine Act of 1976 (5 U.S.C. § 552b), and 41 C.F.R. § 102-3.50(d) (agency authority). Federal Register; Apr. 6, 2012, Vol. 77. Issue 67, p. 20795. The Board is a discretionary federal advisory committee that provides SecDef and the Deputy Secretary of Defense with advice, opinions, and recommendations concerning matters referred to the Board.[1]

At the direction of SecDef, the Deputy Secretary of Defense, or the DoD General Counsel, and according to DoD policy, the Board examines and provides advice regarding legal policy matters within DoD, the achievement of DoD policy goals through legislation and regulations, and other assigned matters.

The SecDef, the Deputy Secretary of Defense, or the DoD General Counsel may act upon the Board's advice and recommendations. When necessary and consistent with the Board's mission and DoD policies and procedures, the Department may establish subcommittees, task groups, or working groups to support the Board.

On July 30, 2012, SecDef directed the Board to review and assess the handling of military justice in cases where U.S. Service members are alleged to have caused the death, injury, or abuse to civilians in Afghanistan and Iraq.[2] The Secretary directed that the review encompass a period dating from October 2001, the beginning of Operation Enduring Freedom, to the present. The purpose of the review is to assess the efficiency, fairness, dependability and credibility of the existing system of military justice that has handled those types of cases and determine if there are areas that could be improved.

[1] DoD Instruction 5105.04, sections E2.22, E3.2.2, and E3.12. The composition of the Board appointed by the Secretary of Defense may be found at Appendix V.
[2] See Appendix I.

The Secretary further directed the review exclude the examinations of detainee abuse, collateral damage, or friendly fire incidents resulting from lawful military operations. He also directed the Board not pass judgment on the results of military justice in particular cases or pending cases or investigations.

Specifically, the Secretary of Defense directed the Board to review:

1) The manner in which such alleged offenses are initially reported and investigated; are there ways to insure that alleged offenses are reported and investigated promptly, thoroughly and accurately; are there ways to improve cooperation with local law enforcement and local communities?

2) The command level at which the initial and final disposition authority now resides in such cases; is it at the right levels, or should the disposition authority be withheld to a different level?

3) In joint deployed areas, should military justice be pursued within the joint force, utilizing joint resources, rather than having cases handled separately and within each component Service?

4) In deployed areas, are resources adequate for the investigation of offenses and the administration of military justice?

5) Should the system of military justice be revised in some manner to improve the way in which cases involving multiple defendants are handled? In cases involving multiple defendants, should the system be revised in some manner to better secure the testimony and cooperation of those involved in the offense? Are there lessons to be learned from the civilian system?

6) Does the military justice system in deployed areas fully preserve the rights of accused, while also respecting the rights and needs of victims and witnesses?

To facilitate this specific task, the Secretary of Defense also appointed a Subcommittee to consider these questions and report to the Board.

The Subcommittee or the Board complied with the Federal Advisory Committee Act (“FACA") and solicited information and testimony from several witnesses and organizations. The list of individuals who either appeared before

the Subcommittee and the Board or presented written matters, or presented written matters, can be found below, in Table 2.[3]

Table 2. Witnesses Who Presented Matters

Witness	Current Position
The Honorable Ray Mabus *written statement*	Secretary of the Navy
The Honorable John M. McHugh *written statement*	Secretary of the Army
Gen[4] James M. Mattis, USMC *written statement*	Commander, US. Central Command
LtGen Richard C. Mills, USMC	Deputy Commandant for Combat Development and Integration
LTG Dana K. Chipman, USA	Judge Advocate General of the Army
VADM Nanette DeRenzi, JAGC, USN	Judge Advocate General of the Navy
Lt Gen Richard C. Harding, USAF *written statement and personal appearance*	Judge Advocate General of the Air Force
MajGen Vaughn A. Ary, USMC	Staff Judge Advocate to the Commandant of the Marine Corps
MG Anthony A. Cucolo, USA	Commandant of the U.S. Army War College
MG David Quantock, USA	Provost Marshal General of the Army and Commander, U.S. Army Criminal Investigation Command
BGen Paul J. Kennedy, USMC	Director for Public Affairs
BG Richard C. Gross, USA	Legal Counsel to the Chairman of the Joint Chiefs of Staff
Brig Gen Kevin Jacobsen, USAF	Commander, Air Force Office of Special Investigations
BG Gary J. Volesky, USA	Chief of Public Affairs

[3] Unless otherwise noted, the witness listed personally appeared before either the Subcommittee or the Board. Officers' current positions are identified in Table 2; their positions while deployed are identified later in the text.

[4] Although the Army, Marine Corps , and Air Force, and utilize a similar officer rank structure – second lieutenant, first lieutenant, captain, major, lieutenant colonel, colonel, brigadier general, major general, lieutenant general, general – the Services uniquely abbreviate the officer ranks. The Air Force abbreviates as follows: 2d Lt, 1st Lt, Capt, Maj, Lt Col, Col, Brig Gen, Maj Gen, Lt Gen, Gen. The Army abbreviates officer rank as: 2LT, 1LT, CPT, MAJ, LTC, COL, BG, MG, LTG, GEN. The Marine Corps abbreviates as follows: 2ndLt, 1stLt, Capt, Maj, LtCol, Col, BGen, MajGen, LtGen, Gen. For the purposes of this report, we abbreviate an officer's rank based upon his service affiliation. The Navy and Coast Guard abbreviate their ranks as: ENS (ensign), LTJG (lieutenant junior grade), LT (lieutenant), LCDR (lieutenant commander), CDR (commander), CAPT (captain), RDML (rear admiral lower half), RADM (rear admiral), VADM (vice admiral), and ADM (admiral).

COL Peter M. Cullen, USA	Chief, Army Trial Defense Service
COL David Hill, USA	Commander, 36th Engineer Brigade
COL Jan Aldykiewicz, USA	Appellate Judge, U.S. Army Court of Criminal Appeals
Col John G. Baker, USMC	Chief Defense Counsel of the Marine Corps
COL Walter Hudson, USA	USCENTCOM Staff Judge Advocate
Col Mark K. Jamison, USMC	Director, Community Development Strategy & Planning, HQMC, Judge Advocate Division
COL Timothy J. MacAteer, USA	Yale Fellow
CAPT Charles N. Purnell, JAGC, USN	Commanding Officer, Defense Services Southeast
COL John B. Richardson, USA	Commander, 3rd Cavalry Regiment
COL George R. Smawley, USA	Student, U.S. Army War College, former, 25th Infantry Division Staff Judge Advocate
Col Dwight D. Sullivan, USMCR	Attorney Adviser, Air Force Appellate Defense Division
LTC Jeffery C. Hagler, USA	Army Office of Congressional Liaison
LTC Keven J. Kercher, USA	Former Chief of Military Justice, Joint Base Lewis-McChord, Washington
Lt Col Julie Pitvorec, USAF	Chief, Senior Defense Counsel
MAJ Alexander N. Hummel Pickands, USA	Regimental Judge Advocate, 3rd Armored Calvary Regiment
MAJ E. John Gregory, USA	U.S. Military Academy Professor of Foreign Languages
MAJ Robert C. Stelle, USAF	Army Special Victim Prosecutor
Mr. Louis N. Eliopulos	Naval Criminal Investigative Service
Ms. Daphne Eviatar	Human Rights First
Ms. Sarah Holewinksi	Center for Civilians in Conflict
Mr. Richard B. Jackson	Special Assistant to the Army Judge Advocate General
Dr. Stjepan G. Mestrovic	Professor of Sociology, Texas A&M University
Mr. Scott Milburn	Naval Criminal Investigative Service
Mr. Mark D. Ridley	Deputy Director, Naval Criminal Investigative Service
Mr. Gary Solis	National Institute of Military Justice
Mr. Guy A. Sorian	Army Criminal Investigation Command

Additionally, the Board heard testimony and received matters from a variety of concerned individuals who provided public statements.[5]

In SecDef's tasking memorandum, he directed that prior to the Board submitting its own advice and recommendation, based on the Subcommittee's report, the Subcommittee's report should be submitted in draft form to the Military Departments for comment. On May 1, 2013, the Subcommittee submitted its draft report to the Military Departments; the Chairman, Joint Chiefs of Staff; and Commandant, U.S. Coast Guard, for comment. The comments provided are included in Appendix VIII of this report.

The Subcommittee reviewed case studies of the following cases: U.S. Marine Corps Haditha cases; the U.S. Army, Maywand District Killings/5-2 Stryker cases; and the U.S. Army, Mahmoudiyah, Iraq/Green cases.[6]

The Subcommittee thanks the Military Service Advisors to the Board who provided excellent support and insight throughout the review process; COL Charles N. Pede, Executive Officer to the Army TJAG and Chief, Criminal Law Division, Office of the Judge Advocate General, USA; CAPT Robert J. Crow, USN, JAGC, Director, Criminal law Division, Office of the Judge Advocate General, USN; Colonel Stephen C. Newman, USMC, Director, Appellate Government Division (Code 46), Navy and Marine Corps Appellate Review Activity; Navy and Marine Corps Appellate Review Activity; and Col David Dales, Chief Military Justice Division, Air Force Legal Operations Agency. The Subcommittee expresses its gratitude to LTC Michael D. Jason, USA, who served as an advisor from the Army G3 office and provided extremely helpful input to the report.

[5] See Appendix VII.
[6] See Appendix V.

The Subcommittee also expresses its appreciation to the administrative team who facilitated the activities of the Subcommittee and Board and prepared this report.[7]

[7] The members of the Department of Defense General Counsel's Office Legal team include DLPB Staff Director, Mr. David Gruber, CAPT, USN(RET); COL Lori Campanella, USA; Maj Justin Martell, USMCR; and Maj Anthony Ghiotto, USAF.

3.0 Military Justice in Combat Zones

"Leaders must ensure that their Soldiers and Marines are ready to be greeted with either a handshake or a hand grenade while taking on missions only infrequently practiced until recently at our combat training centers. Soldiers and Marines are expected to be nation builders as well as warriors."

- Field Manual No.3-24/ Marine Corps Warfighting Publication No. 3-33.5: "Counterinsurgency"

3.1 Introduction

The UCMJ has proven effective and agile in providing a legal framework for US military forces for decades. However, the last decade of operations in Iraq and Afghanistan has provided a wealth of lessons that are instructive for future conflicts. While not universal in application in every context or operation, our recent history has shown ways to promote discipline by integrating military justice processes more thoroughly into joint warfare – and adapt it to the modern battlefield – while maintaining fairness, transparency, reliability, and due process for individual Service members.

Over the last two decades, the preponderance of US military operations has occurred in non-linear conflicts, giving rise to a new set of concerns. Specifically, in a COIN environment, "non-combatants" look like and can be perceived by ground forces as acting like combatants. Often, in today's non-linear battlefield, the enemy does not always wear a discernible uniform; there is no front line on the map where everyone on "the other side" can be considered the enemy. The enemy is aware of the U.S. military's commitment to minimize collateral damage and protect the local population and uses this knowledge to its advantage in numerous ways, such as hiding among non-combatants and causing injury to non-combatants and blaming Coalition forces. U.S. command experiences in Afghanistan and Iraq have demonstrated that mission success in

operations can be significantly and disproportionately compromised by acts caused or alleged to have been caused by U.S. forces, even if those allegations are inaccurate or untrue. In recent years, operating in mostly ungoverned areas of the world, when suspected casualties occur, there are often no local police or civilian authorities that exist to whom events can be reported or discussed. This makes coordination with "local law enforcement" or civil authorities very difficult, if not impossible.

The American lens through which we collectively view "justice" is vastly different from that of many other cultures and countries. While the U.S. military strives to represent the ideals that we hold precious as a Nation, it is often the case that other nations' beliefs cannot be reconciled with ours. For instance, what we may consider as prompt justice may not appear as sufficiently swift to a different culture. Recognizing that every conflict has a different operational backdrop and cultural divide is important to operational planning addressing those differences.

Although U.S. forces operate under a joint command structure, the military justice system remains generally aligned along traditional Service lines of authority. Capturing the lessons learned in Iraq and Afghanistan, and ensuring joint commanders have the means to exercise their military justice responsibility when necessary, is critical to maintaining a deployable and responsive military justice system that supports both the commander and the accomplishment of the mission. The Subcommittee believes that the matters that follow should be presented to the Secretary of Defense with an eye towards integrating them into DoD and joint policy, and when appropriate, reviewed by the Joint Service Committee on Military Justice and implemented by the Services.[8]

This review specifically focuses on the handling of military justice in cases where U.S. Service members are alleged to have unlawfully caused the death, injury, or abuse to civilians in Afghanistan and Iraq and determine if there are areas of military justice practice that could be improved. This review was not

[8] See Section 4.0.

conducted to examine every aspect of military justice practice across the full spectrum of possible issues. The purpose of this review is to assess the efficiency, fairness, dependability and credibility of the existing system of military justice that has handled those types of cases and capture best practices for the future.

3.2 The Impact of Civilian Casualties on Mission Accomplishment Is Ever-Increasing

> **"[T]he battlefields that we walked on in Desert Storm are much different than the battlefields that we've seen in Iraq and Afghanistan. And the challenges that commanders face are much more complex, and the environments that they operate in are more complex, than they've ever seen before."**
>
> **- Brigadier General Gary Volesky, USA**
> **DLPB Meeting, 15 February 2013**

Civilian casualties – which the Subcommittee defines for the purpose of this report as the death, serious injury or abuse of a local national civilian due to the action of U.S. or Coalition forces in a combat environment – is a significant challenge. Crimes committed by Service members against the local populace can greatly and easily undermine the legitimacy of the mission, particularly in COIN operations. Even civilian casualties unrelated to misconduct can have the same impact.

In today's era of fast-paced electronic communication, allegations of improper acts can be sent around the world in seconds, even before preliminary investigations can be started. U.S. and international tolerance for civilian casualties has lessened dramatically over time. The evolution of precision munitions and other technologies have increased our ability to be more discriminating in targeting enemy forces, thus minimizing civilian casualties. The result has been an increased expectation of zero to very minimal civilian casualties on modern battlefields, rendering such casualties much more

conspicuous. Unlike past conflicts such as WWII, with significant numbers of civilian casualties, in today's conflicts, connected by the internet, 24-hour news, cell phones and social media, civilian casualties, actual or fabricated can be exploited internationally instantly. Instantaneous communications can mean instantaneous adverse mission impact. All that said, the fundamental rights of the accused are particularly critical on the complex COIN battlefields that demand so much of Service members' individual judgment in complex and difficult circumstances.

Success in operations and even major campaigns can be impacted by acts alleged to have been caused by U.S. forces, even if inaccurate or untrue. Therefore, how we respond to civilian casualties and the claims and allegations of civilian casualties must be a priority of mission planning, training and execution. Campaign planning must take into account the necessity of determining the truth of allegations of civilian deaths or serious injuries; how to respond to allegations; and how to communicate quickly and effectively about them to Service members, victims and families, other local citizens, host-nation authorities (where they exist), coalition partners and the U.S. public.

Prompt and holistic consequence management that recognizes potential flash points, appropriate restitution to victims or survivors, and functions in cooperation with host nation institutions and culture, are necessary aspects of appropriately and effectively handling incidents that arise when dealing with the civilian population. This is especially salient in a COIN and some low-intensity operations. Sharing the results of military justice system processes with interested parties and the public, when possible and reasonable to do so, demonstrates the system's legitimacy, prevents and deters future misconduct, enhances overall military discipline, and is often essential to accomplishing tactical, operational, and strategic military and political objectives. It is also an important safeguard against potential abuses within the military justice system itself.

3.3 The Promotion of Good Order and Discipline in the Armed Forces in Combat

Military justice is the legal structure[9] by which the armed forces enforce good order and discipline.[10] Discipline is an essential attribute of an effective military organization. It is, as George Washington once remarked—"the soul of an Army."[11] Because "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise,"[12] the military is separate from civilian society[13] and it "must insist upon respect for duty and a discipline without counterpart in civilian life."[14] To ensure success in combat, members of the military "must instantly obey lawful orders, no matter how unpleasant or dangerous the task may be."[15] "If commanders cannot reasonably rely upon their troops to obey and perform, and if the troops cannot rely on each other, the effectiveness of the fighting force will be undermined and, ultimately, the national interest will be imperiled."[16] In short, it is the military ethos of discipline and adherence to lawfully exercised command authority that allows the U.S. military to operate as an effective fighting force anytime, anywhere, under any condition.

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[9] The substance of military justice is the Uniform Code of Military Justice ("UCMJ"), U.S. Code, Title 10, Chapter 47, and the Manual for Courts-Martial ("MCM"), Executive Order 13387 (as amended). DoD directives and instructions and Service regulations further implement the MCM and also provide additional tools that support military justice.

[10] See William Winthrop, *Military Law and Precedents* 48-49 (2d. ed. 1920)(describing courts-martial as instrumentalities of the executive power, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein), cited in R. Chuck Mason, Military Justice, An Overview, Congressional Research Service (Mar. 14, 2012). The Supreme Court has regularly recognized the unique nature of military justice. *See, e.g.,* Burns v. Wilson, 346 U.S. 137, 140 (1953)("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," cited in Parker v. Levy, 417 U.S. 733, 743 (1974).

[11] BG John S. Cooke, *Military Justice and the Uniform Code of Military Justice,* ARMY LAW., Mar. 2000, at 1, 6 (quoting D.S. Freeman, Washington 116 (1968)).

[12] Toth v. Quarles, 350 U.S. 11, 17 (1955).

[13] Parker v. Levy, 417 U.S. 733, 743 (1974); see also Jonathan Lurie, *Arming Military Justice* 5 (1992) (stating that the Continental Congress' establishment of military courts-martial in 1776 was based upon its belief that "governance of the military was based on needs very different from those of a civilian polity").

[14] Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); see also Burns v. Wilson, 346 U.S. 137, 139 (1953) (plurality decision).

[15] CDR Edward M. Byrne, *Military Law* 1 (2d ed. 1975); see also United States v. Grimley, 137 U.S. 147, 153 (1890):

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.

[16] William A. Moorman, *Fifty Years of Military Justice*: *Does the Uniform Code of Military Justice Need to Be Changed?*, 48 A.F. L. REV. 185, 188 (2000).

Indiscipline in any environment can be corrosive, but it can have catastrophic effects in combat. Even simple military offenses that are not crimes in the civilian system of justice, such as disrespect or being late or absent, can undermine a mission. Military justice is a tool for commanders to enforce discipline within their units, thereby buttressing their ability to execute their missions. It is an essential element of military culture - a way of thinking - an ethos. Military justice serves the overall military objective of supporting our national defense.

While military law assists in maintaining good order and discipline its purpose is also to promote justice.[17] A system of justice that guarantees individual rights, due process, and impartiality is essential to the morale of those who serve in the military.[18] Moreover, a system that promotes justice as well as discipline "demonstrably rewards those [Service members] who obey the law. It proves to them that their obedience is worthwhile."[19] The system's focus on justice recognizes that discipline is not only achieved by fear of punishment for doing something wrong, but faith in the value of doing something right.[20]

3.4 The Commander's Responsibilities for Reporting and Investigating Crimes

While compliance with international law and domestic U.S. law is essential, U.S. fighting forces must also be perceived as, and perceive themselves as, ethical and disciplined combatants.[21] Military Justice is critical to

[17] MCM, Part I, paragraph 3 (2012 ed.).
[18] Moorman, supra note 16, at 188.
[19] Walter T. Cox, III, *Echoes and Expectations*: *One Judge's View*, 159 MIL. L. REV. 183, 202 (1999).
[20] Cooke, supra note 11, at 7.
[21] U.S. Military Counterinsurgency Manual, Field Manual 3-24/Marine Corps Warfare Publication 3-33.5 (15 Dec. 2006) (hereafter U.S. Military COIN Manual) addresses the importance of ethical behavior: Paragraph 7-2. Army and Marine Corps leaders work proactively to establish and maintain the proper ethical climate of their organizations. They serve as visible examples for every subordinate, demonstrating cherished values and military virtues in their decisions and actions. Leaders must ensure that the trying counterinsurgency (COIN) environment does not undermine the values of their Soldiers and Marines. Under all conditions, they must remain faithful to basic American, Army, and Marine Corps standards of proper behavior and respect for the sanctity of life. Paragraph 7-3. Leaders educate and train their subordinates. They create standing operating procedures and other internal systems to prevent violations of legal and ethical rules. They check routinely on what Soldiers and Marines are doing. Effective leaders respond quickly and aggressively to signs of illegal or unethical behavior. The Nation's and the profession's values are not negotiable. Violations of them are not just mistakes; they are failures in meeting the fundamental

this perception as it is an essential tool of commanders to maintain good order and discipline. But, its effectiveness depends in large part on the ability to timely report allegations, investigate effectively, collect and preserve evidence, and make it available to commanders and courts. These kinds of investigations are also important to dispelling inaccurate or false allegations of misconduct such as causing civilian casualties.[22]

Nonetheless, investigative responses to reports of civilian casualties in a combat theater are difficult and can be dangerous. Commanders must balance the risk to their forces with the credibility and severity of the allegations and mitigate the risks when they direct investigations.

The key to the Commander's ability to investigate and address civilian casualty incidents is the reporting of such incidents up the chain of command. While local authorities, local populations, non-governmental organizations ("NGOs") and the media are important sources of information about civilian casualties, the most important "sensors" are the Service members themselves. Commanders at every level must clearly establish reporting requirements and enforce them. Service members must be required and willing to report, even when doing so may adversely implicate a comrade.

Small unit loyalties can be a powerful inducement not to report. Creating the willingness to report is a function of both training and the establishment of an ethical command climate in combat. This requires early commander and leader involvement during focused training, training exercises, and deployment preparations. Willingness to report depends on Service members' confidence

standards of the profession of arms. Paragraph 7-25. A key part of any insurgent's strategy is to attack the will of the domestic and international opposition. One of the insurgents' most effective ways to undermine and erode political will is to portray their opposition as untrustworthy or illegitimate. These attacks work especially well when insurgents can portray their opposition as unethical by the opposition's own standards. To combat these efforts, Soldiers and Marines treat noncombatants and detainees humanely, according to American values and internationally recognized human rights standards. In COIN, preserving noncombatant lives and dignity is central to mission accomplishment. This imperative creates a complex ethical environment.

[22] The U.S. Military COIN Manual explains: Paragraph 7-10: Senior commanders must maintain the "moral high ground" in all their units' deeds and words. Information operations complement and reinforce actions, and actions reinforce the operational narrative. All COIN force activity is wrapped in a blanket of truth. Maintaining credibility requires commanders to immediately investigate all allegations of immoral or unethical behavior and provide a prudent degree of transparency.

that the chain of command and investigations will be impartial and demonstrate a lack of culpability when appropriate. They must be convinced that the process will be fair.

Command authority is at the heart of every aspect of military justice, from determining whether non-judicial punishment should be imposed for minor infractions, to convening courts-martial and referring criminal allegations to them for trial. Command relationships are becoming increasingly complex with the evolution of the joint command structure. Large combat units deploy in whole and in parts; smaller elements and individual personnel are assigned command relationships with larger units and deployment timelines are varied. The command relationships of these smaller units and individual augmentees to the responsible unit are often complicated and not always uniform. These organizational constructs may also include special operation forces and civilian contractors. Units often operate in the same operational area under different commanders and reporting chains.

Military justice decisions will significantly impact the operational mission, and because virtually all U.S. deployments now occur as part of a joint command structure, they are of operational importance to the joint command, even though much administration of military justice has traditionally been accomplished by the Service components.

Thus, commanders must align the military justice structure for deployments, including determining which commanders will exercise military justice authority over Service members and for what types of offenses. During the joint-planning process, the joint force commander should determine and prescribe the military justice jurisdictional responsibility in the area of operations. This may include establishing area-based jurisdiction and what, if any, category of issues will be withheld at the joint force level.

3.5 The Military Justice System in an Increasingly Joint Environment

Because the military operates worldwide, its military justice system must be portable, agile, and facilitate command-centric military justice. The notion that commanders have the ability to deal swiftly, fairly, competently, and visibly with all misconduct, both in and out of the field environment, is necessary to achieve effective deterrence and discipline. Executing fair, prompt military justice reinforces command responsibility, authority, and accountability. This is true across the Services, and underscores the uniformity and jointness of the military justice system. Further, the military justice system provides commanders myriad tools to consider the nature of offenses and the harm created thereby, and allows them to apply the correct tools at the appropriate level. Unless withheld by superior authority, all commanders may exercise certain disciplinary authority under the UCMJ. Some commanders may act as "convening authorities" and determine what cases should be referred to court-martial (from least significant by potential consequence to most significant): summary courts-martial, special courts-martial, and general courts-martial.

Whether in Service command chains or joint command chains, convening authority is conferred by operation of law, or by superior authority designation, with general court-martial convening authority ("GCMCA") usually reserved to senior command levels. GCMCAs are an essential component of the military justice system. They exercise oversight responsibility, have the authority to limit the scope of subordinate commanders' UCMJ authority, and bring cases or categories of cases to their level for disposition. As in any system of justice, it is critical at all levels to maintain a fair, flexible, efficient, dependable, and credible process to address allegations of misconduct that arise in any context.

3.6 Considerations When Conducting Judicial Operations in a Deployed Environment

Although commanders indicate that they generally prefer that military justice actions occur at the deployed location, commanders may determine that, for a variety of reasons, a case should be adjudicated in the United States rather

in the deployed area. Reasons for doing so may include host nation volatility or other conditions on the ground, unit rotation timing, and the complexity of the individual cases. Nonetheless, moving military justice processes from the locality where the alleged crimes occurred distances them from witnesses and evidence, and involves additional commands. Flexibility to make these decisions on a case-by-case basis is invaluable as each case presents different challenges.

The nature of operating in today's combat environment poses another set of challenges for commanders and staffs in processing military justice actions. Today military units are assigned battlespace that is significantly larger than similar units occupied in past conflicts. Brigades are assigned operational battlespace that used to be the doctrinal province of divisions and corps. Thus, movement of personnel and assets in support of an investigation or legal proceedings becomes a tactical mission unto itself and may come at the expense of resources that would otherwise support the current fight. Depending on the unit, deployment rotations generally vary in length. Investigators change over time. Witnesses redeploy before cases are tried. Selected panels of court members, chosen upon deployment by the convening authority, are often greatly diminished several months into the deployment due to unit rotations. Even prosecution and defense teams turn over. The timing of cases requires close management to preserve force deployment limitations for critical personnel. Securing facilities for courts, moving and billeting witnesses, maintaining custody of evidence, and imposing pretrial confinement for the accused are also challenges.

Additional options for maintaining discipline provide commanders with flexibility, but also add complexity. While critical to mission effectiveness, military justice is only one tool for enforcing discipline. Also available to commanders are a variety of administrative processes, including administrative inquiries or investigations, administrative sanctions (such as reprimands), removal from command, relief of duties and responsibilities and administrative discharges.

These tools also affect how and when commanders use military justice processes.

During the last decade of fighting in Iraq and Afghanistan, the existing system of military justice has been refined and has proven effective, however, numerous lessons learned highlight the imperative to continue to adapt and prepare for future conflicts.

4.0 Subcommittee Findings and Recommendations

4.1 Summary Findings and Recommendations

The Subcommittee submits these findings and recommendations in response to the issues raised in SecDef's July 30 memorandum. The remainder of the report addresses SecDef's concerns by discussing case development in deployed environments, specifically: incident reporting; inquiry, assessment, and immediate response; investigation; and case resolution. This discussion amplifies the Subcommittee's findings and recommendations. The recommendations are also summarized in Appendix III. The Subcommittee defines the term "civilian casualty" for the purpose of this report as the death, serious injury or abuse of a local national civilian due to the action of U.S. or coalition forces in a combat environment.

SecDef requested an assessment of six civilian casualty issues. Each issue is detailed below and is followed by sets of findings and recommendations. The recommendations should be presented to the DoD General Counsel and SecDef to be integrated into DoD and joint policy, and when appropriate, reviewed by the Joint Service Committee on Military Justice to be uniformly implemented by the Services.

SecDef Issue:

1) *The manner in which such alleged offenses are initially reported and investigated; are there ways to insure that alleged offenses are reported and investigated promptly, thoroughly and accurately? Are there ways to improve cooperation with local law enforcement and local communities?*

A. First Set of Findings and Recommendation (SecDef Issue 1):

See Section 5.0 for additional discussion.

Findings:

- U.S. forces comply with the DoD Law of War Program and international reporting and response requirements, but

experience has demonstrated that civilian casualties not covered by the Law of War program can have significant mission and national consequences.

- U.S. military units and Military Criminal Investigative Organizations ("MCIOs")[23] developed effective and efficient reporting, investigative, and response procedures for civilian casualty incidents over the course of operations in Iraq and Afghanistan.

- These processes have not yet been effectively captured and integrated into formal DoD-wide policies and procedures.

Recommendation:

- The effective and efficient reporting, investigative, and response procedures concerning civilian casualties[24] used in Iraq and Afghanistan should be captured and integrated into joint doctrine and further implemented by Service regulations.[25]

B. Second Finding and Recommendation (SecDef Issue 1):
See Section 5.0 for additional discussion.

Finding:

- Doctrine, tactics, and procedures must be sufficiently flexible to adapt to particular operating environments in every contingency and area of operations.

Recommendation:

- Deliberate planning for any campaign should include detailed joint guidance appropriate to the operating environment and area of operations for reporting through operational channels, investigation, and UCMJ/administrative disposition of alleged or discovered incidents of civilian casualties from military operations.

[23] See DoDD 5505.3, *March 24, 2011* MCIO - U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.
[24] "Civilian casualty" is defined for the purpose of these recommendations as the death, serious injury or abuse of a local national civilian due to the action of U.S. or Coalition forces in a combat environment.
[25] Joint Doctrine includes DoD regulations and Instructions, Chairman of the Joint Chief's publications and instructions, and Service regulations, pamphlets and implementing training guidance at schools, training centers and unit level training. This applies throughout the report where the Subcommittee recommends that joint doctrine incorporate items.

C. Third Set of Findings and Recommendations (SecDef Issue 1): See Section 5.0 for additional discussion.

Findings:

- Documenting all alleged civilian casualty cases, especially in low intensity or COIN environments, allows commanders to determine the facts reliably; dispel false claims or accusations; correct operational or procedural shortcomings; provide effective prompt restitution to survivors and support for victims; address misconduct; promote the effective uninterrupted conduct of operations; and provide transparency at all stages.

- Experienced commanders consistently expressed the importance of investigating all allegations, regardless of source, because even allegations from questionable sources may have basis in fact. Investigating all allegations, regardless of source, also assists in dispelling unfounded allegations.

Recommendations:

- Whenever possible, especially in COIN operations, doctrine and deliberate planning should require notice of civilian casualties to senior operational commanders immediately or as soon as circumstances permit, in a manner prescribed by the senior joint force commander.

- Notification of a civilian casualty should be made at least to the first General Court-Martial Convening Authority ("GCMCA") in the operational chain of command, and to the Geographic Combatant Commander.

- Especially in COIN operations or other suitable operational environments, and tactical considerations permitting, doctrine and deliberate planning should require commanders to conduct an uncomplicated, prompt, initial fact-finding inquiry, in civilian casualty cases to determine the readily available facts, likely cause, and extent of U.S. or coalition force involvement.

- If a command prescribed preliminary inquiry suggests that U.S. forces may have improperly caused death or injury, or it appears the local population or leadership believes this to be

the case, a full administrative investigation or referral to the relevant MCIO as appropriate, should follow.

- Administrative investigations of civilian casualty incidents should be conducted by teams from echelons above the unit involved in the incident, or by teams from outside the unit's immediate area of operations, at the discretion of the senior commander (O-6 or above) responsible for operations in the region or as directed by higher command authority.

D. Fourth Set of Findings and Recommendation (SecDef Issue 1): See Section 6.0 for additional discussion.

Findings:

- The "DoD Law of War Program" requires prompt reporting and investigation of "reportable incidents" which are possible, suspected, or alleged violations of the law of war for which credible information exists.

- Limiting reporting to "credible information" is too subjective to ensure responsible commanders consistently receive appropriate information.

- Labeling incidents as potential law of armed conflict ("LOAC") violations can have a chilling effect on reporting, regardless of the nature of the conflict.

Recommendation:

- Initial inquiry into civilian casualty incidents should be followed by a determination as to the extent and type of additional investigation that may be needed.

- The assessment of whether a civilian casualty incident is a possible LOAC violation reportable under the DoD Law of War Program should be a separate determination from the civilian casualty report and investigation requirement. Determination of LOAC-reportable incidents should be made at the command level directed by the responsible GCMCA, but at no lower level than an O-6 commander with a judge advocate on his or her staff.

E. Fifth Set of Findings and Recommendation (SecDef Issue 1):
See Section 7.0 for additional discussion.

Findings:

- Command assessments, such as After Action Reviews (AAR) or formal and informal inquiries, are essential in avoiding future incidents by examining tactics, techniques, and procedures, and evaluating command climate and responsibility.

- Cases involving civilian casualties may require both command-driven assessments and criminal investigations.

Recommendation:

- Timely disposition of investigatory matters is critical. At the GCMCA's discretion, command assessments and criminal investigations can and should be performed concurrently, as is commonly the practice in the Army. Commanders and MCIOs should de-conflict and coordinate concurrent command assessments and criminal investigations. As part of the Joint Planning-Process, consider how criminal investigations will be coordinated.

F. Sixth Set of Findings and Recommendation (SecDef Issue 1):
See Section 6.0 for additional discussion.

Findings:

- Keeping the host nation civilian leadership and population informed of ongoing investigations and outcomes is critical to operational success.

- A practice that has evolved in the recent COIN operational environment to ensure effective response, and improve cooperation with local law enforcement and local communities, is the establishment of an incident assessment team ("IAT") that deploys in serious civilian casualty incidents.[26]

[26] See CJTF-82 Memorandum for Record, SUBJECT: Regional Command-South Incident Assessment team Standard Operating Procedures, dated 18 February 2012. The purpose of a IAT is to deploy to appropriate locations to quickly assess significant incidents and make recommendations to the senior leadership regarding further action. The IAT is not typically a detailed inquiry or systematic examination and in not designed or intended to replace the JAGMAN or AR 15-6 investigation. Participants are advised that participation is voluntary and that the IAT is not intended to assess or apportion blame, liability or criminal responsibility. It is designed to quickly inform a commander of the significance and extent of an incident.

Recommendation:

- Future doctrine should include holistic consequence management solutions such as the Incident Assessment Team concept as a best practice.

G. Seventh Finding and Recommendations (SecDef Issue 1):
See Section 5.0 for additional discussion.

Finding:

- A moral, ethical command combat climate that inculcates and maintains U.S. values despite the difficulties of the mission or the particular area of operations is the single most important factor in preventing civilian casualties, ensuring civilian casualty reporting, and appropriately addressing reported incidents.

Recommendations:

- Continue to train and expand battlefield ethics / lessons-learned training curriculum extrapolated from after action reports (*e.g.*, civilian casualty reporting, LOAC, military ethos, command climate), during all levels of professional military education ("PME"), formal and informal schooling, exercises, and unit training.

- Train ethical leadership to the lowest level in garrison and throughout deployments.

- Reassess the DoD Law of War Program to ensure currency and consistency with best practices.

H. Eighth Finding and Recommendation (SecDef Issue 1):
See Section 5.0 for additional discussion.

Finding:

- Cooperation with the International Committee of the Red Cross ("ICRC") and respected Nongovernmental Organizations ("NGOs"), not only increases transparency in the process, but also provides outside perspectives that augment DoD perspectives.

Examples are Blue on Green incidents or any incident that can harm relations with the host nation, enhance enemy activity or generate negative international publicity.

Recommendation:

- Campaign planning should address communications with NGOs in the area of operations.

SecDef Issue:

2) *The command level at which the initial and final disposition authority now resides in such cases; is it at the right levels, or should the disposition authority be withheld to a different level?*

See Section 8.0 for additional discussion.

Finding:

- The Subcommittee concludes that the initial and final disposition authority in serious cases is currently being exercised at command levels where commanders have adequate resources and can make sound decisions.

Recommendation:

- Remove from current joint doctrine the default that disciplinary authority shall be exercised by Service component commanders and instead specify in joint doctrine that discipline is the responsibility of joint force commanders at all levels.

SecDef Issue:

3) *In joint deployed areas, should military justice be pursued within the joint force, utilizing joint resources, rather than having cases handled separately and within each component Service?*

A. First Set of Findings and Recommendations (SecDef Issue 3):

See Section 8.0 for additional discussion.

Findings:

- Throughout the conflicts in Iraq and Afghanistan, the individual Services have managed military justice for their own personnel despite operating in joint deployed environments.

- Lack of resources, existing doctrine, custom and habit result in joint force commanders and their staffs turning to Service assets to manage long-running complex cases; these cases

have often moved out of theater to convening authorities in the continental United States ("CONUS") to facilitate Service management.

- Current doctrine recognizes the joint force commander's responsibility – except for combatant commanders - but does not include discipline within operational control ("OPCON") authority.

Recommendations:

- During the joint-planning process, the joint force commander should determine and prescribe the military justice jurisdictional responsibility in the area of operations. This may include establishing area-based jurisdiction and what, if any, category of issues will be withheld at the joint force level.

- Deployment orders should prescribe at least concurrent joint force command UCMJ authority with the Service component commander over forces over which OPCON passes or that are physically in the area of operations.

B. Second Finding and Recommendation (SecDef Issue 3):
See Section 8.0 for additional discussion.

Finding:

- When combatant or joint commanders retain military justice authority, they must have sufficient resources to execute the joint-justice mission.

Recommendation:

- Review the resourcing of joint staffs and joint task forces and how Service component commanders support the joint force commander ("JFC"). Such a review should consider alternatives for supporting joint convening authorities, to include assignment or temporary attachment of personnel to the joint headquarters, and designation of a Service component to support the joint convening authority.

C. Third Finding and Recommendation (SecDef Issue 3):
See Section 7.0 for additional discussion.

Finding:

- To ensure efficient, expeditious processing of civilian casualty cases, the joint force commander must continuously monitor the status and progress of each case.

Recommendation:

- Joint doctrine should clarify that the joint force commander may prescribe guidelines for subordinate commanders to report the progress of investigations and prosecutions for civilian casualties.

D. Fourth Set of Findings and Recommendations (SecDef Issue 3): See Section 8.0 for additional discussion.

Findings:

- A significant issue related to the joint force commander's responsibility for discipline and for resolving civilian casualty incidents in the area of operations is the adequacy of the joint force commander's actual control over the operational environment.

- Commanders must have control of their respective battlespaces and the necessary tools to ensure consistent application of LOAC, rules of engagement ("ROE"), and battlefield ethics.

- Commanders do not have sufficient authority to adequately handle alleged contractor misconduct relating to civilian casualties.

- Commanders have some authority over contractors who are serving with or accompanying an armed force in the field, but that authority is effectively withheld at SecDef level.[27]

- Despite contract provisions and directives to contractors to provide notice to commanders when they operate in a particular area, commanders do not always receive advance notice of contractor activities in their area.

[27] There are potential constitutional issues raised by extending court-martial jurisdiction to civilians. This notion is examined more fully in the body of this report. The Supreme Court's decision in Reid v. Covert, 354 U.S. 1, 33 (1957), gives a potential basis for jurisdiction: "In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an actual area of fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." United States v. Ali, 71 M.J. 256 (2012) (upholding the expanded Article 2(10)).

- Commanders are not always provided information concerning contract remedies.

Recommendations:

- Article 2, UCMJ, should be amended to allow for jurisdiction over all U.S. government contractors on the battlefield, regardless of U.S. government departmental affiliation.

- All contractors entering the operational environment should receive appropriate battlefield ethics training, as a term of their contract.

- Contractors should be required to notify commanders of incidents and respond to Commander's Critical Information Requirements ("CCIR"), especially when they are involved in civilian incidents that occur in a commander's battlespace, as a term of their contract.

- Develop a mechanism to ensure that contracting officers inform commanders of contractor presence and contract terms and processes to respond to contractor misconduct.

SecDef Issue:

4) *In deployed areas, are resources adequate for the investigation of offenses and the administration of military justice?*

A. First Set of Findings and Recommendation (SecDef Issue 4):
See Section 7.0 for additional discussion.

Findings:

- MCIOs have played a critical role in civilian casualty cases involving suspected criminality. While retaining independent investigative discretion, they have been responsive to commanders and kept them informed of cases.

- The differences between the Services regarding authority over and their relative independence are confusing. MCIO-command relationships must be clear in a Joint environment and not Service-dependent. MCIOs must be responsive to the investigative needs and priorities of the joint force commander, without diminishing the existing authority of the Service Secretaries.

- Currently, there is no joint doctrine regarding MCIO operations in combat theaters.

Recommendation:

- Joint doctrine and planning guidance should address MCIO support that provides timely and effective investigation processes to sensitive and high profile incidents such as civilian casualties in the current or anticipated operational environment.

B. Second Set of Findings and Recommendations (SecDef Issue 4): See Section 7.0 for additional discussion.

Finding:

- A substantial amount of forensic evidence is sent back to the United States from deployed areas for examination by certified laboratories.

- This process adds months to the duration of investigations and adversely affects commanders' ability to swiftly dispose of such cases.

Recommendations:

- Doctrine and operational planning should provide for a certified forensics capability close to the area of operations to better support criminal investigations, particularly those involving civilian casualties.

- Joint doctrine should establish a process to insure that appropriate MCIO expert investigative capabilities, regardless of Service, can respond immediately to augment assets in the area of operations to cases involving potentially criminal civilian deaths or injuries.

- Include in joint and Service doctrine and planning a preference for trials forward when practicable.

C. Third Findings and Recommendation (SecDef Issue 4):

See Section 5.0 for additional discussion.

Finding:

- Every senior commander emphasized the importance of co-locating judge advocates with combat commanders and units. This is particularly important in non-linear COIN operations when relatively junior commanders exercise levels of responsibility previously reserved to far more senior and experienced commanders, but are far removed from traditional in-garrison legal resources.

Recommendation:

- During the joint planning process, a determination should be made, based on the operational environment, as to when additional legal support will be needed to support battalion, or equivalent level deployed operations. To the extent possible, this assessment should be made early enough to allow the legal advisor to train with the unit scheduled to deploy. Further, the Services should be adequately resourced to ensure that judge advocates are available to support deployed operations without degrading other missions.

D. Fourth Finding and Set of Recommendations (SecDef Issue 4):

See Section 8.0 for additional discussion

Finding:

- Cases involving death or serious injury to civilians in combat environments tend to be complex and lengthy, due to investigative, evidentiary, and witness challenges, and sheer increased logistical difficulty of operating in a combat environment.

Recommendations:

- Establish litigation resources to support the prosecution and defense of complex civilian casualty cases, or similar high profile cases. In doing so, consider maintaining the continuity of counsel, when possible, for the duration of major cases while ensuring this does not adversely affect the counsels' potential for professional development and promotion.

- Review personnel policies as they relate to trial and defense counsel, and other court personnel, who may become involved in complex long-running cases involving civilian casualties to ensure protection from adverse career impacts.

- Implement specialized trial advocacy and investigative training for judge advocates involved with civilian casualty cases arising in a deployed environment.

- As leveraging assets is important in a joint environment to optimize capability, Services should consider methods of pooling military judges and defense counsel, or managing them across the Services because timely and effective military justice depends on their initial and continuing availability.

E. Fifth Set of Findings and Recommendation (SecDef Issue 4):
See Section 8.0 for additional discussion.

Findings:

- Pretrial confinement is an essential tool for commanders to deal with serious misconduct and continued threats in the deployed environment and must be an available and practical option. Its impracticality can directly determine outcomes when trying civilian casualty cases in an area of operations.

- Currently, pretrial confinement is not easily achieved.

Recommendation:

- The deliberate planning process should consider establishing pretrial confinement facilities close to the area of operations.

F. Sixth Finding and Recommendation (SecDef Issue 4):
See Section 7.0 for additional discussion.

Finding:

- Investigations cannot be fully useful to commanders and the Department of Defense, generally, unless practical means exist to record them in a central repository and search and analyze them after the passage of time. A central repository does not currently exist.

Recommendation:

- DoD should create an administrative investigation central repository for GCMCA command directed investigations concerning civilian casualties and other investigations concerning civilian casualties it deems necessary to retain.

SecDef Issue:

5) *Should the system of military justice be revised in some manner to improve the way in which cases involving multiple defendants are handled? In cases involving multiple defendants, should the system be revised in some manner to better secure the testimony and cooperation of those involved in the offense? Are there lessons to be learned from the civilian system?*

See Section 8.0 for additional discussion.

Findings:

- Joint trials can potentially reduce the time and cost to try cases, avoiding multiple appearances by military and civilian witnesses.

- Severance – having separate trials of individual accused – is required if an accused would be prejudiced by being tried jointly. This is the same standard that applies in the federal courts, but the MCM provides that a request for severance should be liberally considered.

Recommendations:

- Amend the MCM to strike the preference for liberal treatment of motions to sever and allow prosecutors the discretion to examine the facts and circumstances of individual cases to determine when and if a joint trial is desirable. Such factors must also include consideration of individual accused rights when co-accused elect different forums.

- Senior judge advocate leaders should review current training and policy with a view towards encouraging greater use of joint trials even under the existing MCM guidelines.

SecDef Issue:

6) *Does the military justice system in deployed areas fully preserve the rights of accused while respecting the rights and needs of victims and witnesses?*

A. First Set of Findings and Recommendation (SecDef Issue 6):
See Section 8.0 for additional discussion.

Findings:

- The Article 32 process adds a key layer of protection for accused in the courts-martial process.
- Commanders unanimously noted that the Article 32 process should remain robust and has not interfered with mission accomplishment.

Recommendation:

- Consider enhanced training for Article 32 investigators and judge advocates representing the government and individual accused to address what is and is not required and helpful during an Article 32 investigation, and the proper exercise of discretion by Article 32 investigating officers to limit such investigations.

B. Second Set of Findings and Recommendation (SecDef Issue 6):
See Section 8.0 for additional discussion.

Findings:

- The standard of proof for Article 15, UCMJ is not uniform for each of the Services.

Recommendation:

- Review whether increased uniformity in non-judicial processes and standards is appropriate.

C. Third Finding and Recommendations (SecDef Issue 6):

See Section 8.0 for additional discussion.

Finding:

- Victim-Witness Assistance Program standards regarding care, support, and the distribution of information apply to victims and witnesses in all cases, regardless of location.

- It is apparent, though, that such standards have not been observed as rigorously in deployed environments.

Recommendations:

- DoD doctrine should be developed to care for, support, and inform victims and witnesses in cooperation with available Host Nation institutions in deployed environments, particularly local nationals in civilian casualty cases.

- Develop an informational leaflet or handout relating to the judicial process for family members of those accused of crimes.

D. Fourth Set of Findings and Recommendation (SecDef Issue 6):

See Section 8.0 for additional discussion.

Findings:

- Active duty witnesses and victims redeploy out of combat zones and separate from the Armed Forces. Additionally, many active duty members who do not redeploy remain engaged in military operations that render their availability to participate in the court-martial process impossible or impractical.

- In war-torn countries, the government faces the real risk of victims and witnesses disappearing or dying. The pressure of ensuring that all relevant witnesses are available and physically in place to participate in deployed courts-martial could potentially strain the commanders' ability to efficiently and effectively preserve good order and discipline in their units.

Recommendation:

- To reduce the burden on commanders, operations and witnesses, the UCMJ should be amended (rather than amending the Manual for Courts-Martial ("MCM") alone) to permit alternatives to live testimony at trial in cases arising in a combat environment when non-military witnesses refuse to provide in-person testimony, and when witnesses are not reasonably available.

E. Fifth Finding and Recommendations (SecDef Issue 6):
See Section 8.0 for additional discussion.

Finding:

- Commanders require flexibility to address the exigencies of combat environments, particularly during the rotation of units and commanders in and out of combat areas of operation.

Recommendations:

- The MCM should be amended to authorize a convening authority to transfer convening authority functions to another convening authority's jurisdiction after a case has been referred to trial.

- Include in doctrine the use of a Consolidated Disposition Authority to exercise convening authority over geographically dispersed accused when cases or accused return to CONUS.

F. Sixth Finding and Recommendation (SecDef Issue 6):
See Section 7.0 for additional discussion.

Finding:

- The current mechanism for the military Services to obtain electronic communications from civilian companies to support criminal investigations in the deployed environment is inefficient and overly burdensome.

Recommendation:

- Review how search warrant authority can be acquired to permit the military Services to quickly and efficiently obtain

electronic communications and records without lengthy Department of Justice involvement.

G. Seventh Finding and Recommendation (SecDef Issue 6):
See Section 8.0 for additional discussion.

Finding:

- Leaders should be held accountable for failures to appropriately respond to civilian casualty incidents. The current maximum punishment allowed for dereliction of duty (six months of confinement and a bad conduct discharge) may not always be sufficient to provide a credible deterrence to such misconduct or to provide a sense of justice to the local population in cases where such dereliction of duty results in, or aggravates, civilian casualties.

Recommendation:

- The MCM should be amended to increase the maximum punishment for dereliction of duty to ensure appropriate sanctions in civilian casualty cases.

H. Eighth Finding and Recommendation (SecDef Issue 6):
See Section 7.0 for additional discussion.

Finding:

- Differing standards exist among the Armed Services concerning the releasability of information about administrative sanctions and personally identifiable information. This inhibits and confuses communications.

Recommendation:

- The DoD should develop uniform guidelines for the release of information concerning administrative sanctions imposed on Service members.

4.2 Issues Outside the Scope of the Secretary of Defense's Mandate

In the course of its work, the Subcommittee identified three additional issues affecting the rights of the accused that we believe are significant and that we recommend be reviewed:

- Review whether to amend the UCMJ to eliminate the mandatory life sentence for premeditated murder and vest discretion in the court-martial to adjudge an appropriate sentence.
- Review whether to amend the MCM so that the defense need not request a trial witness from the trial counsel in the first instance.
- Review whether to amend the UCMJ or other statutes to permit an accused to appeal to the Supreme Court in cases in which the Court of Appeals for the Armed Forces denies a petition for review.

4.3 Sustained Best Practices

1. DoD should continue to meet with the ICRC to solicit views and provide feedback about ICRC global initiatives.

2. Continue to invite the ICRC to participate in LOAC training during pre-deployment mission rehearsal exercises.

3. MCIOs should continue to regularly report progress to the joint force commander, as well as within their respective Service channels.

4. Operational commanders should continue to make timely support of MCIO investigators a priority.

5. Continue paying compensation to victims in the deployed environment (*e.g.*, Solatia, Commanders Emergency Response Fund, etc.) quickly in accordance with existing doctrine.

6. Convening authorities should, as appropriate, continue to conduct combined Article 32, UCMJ investigations for several accused Service members when their underlying misconduct arises from the same series of events.

7. Continue the requirement for a preliminary inquiry in every civilian casualty incident involving death or serious injury.[28]

8. Continue to use the Incident Assessment Team concept as a bridge from preliminary inquiry to investigation.

[28] DoD should consider standardizing preliminary inquiries, or at a minimum providing specific guidance on timeliness and procedure. In some OEF Regional Commands, Army commanders directed all attached joint forces conduct Army Regulation 15-6 inquiries whenever civilian casualty incidents occurred. This provided a uniform standard for reporting and allowed for effective and rapid consequence management.

5.0 Incident Reporting

5.1 Introduction

To achieve an appropriate, fair, just resolution in criminal justice cases involving the death or serious injury to civilians, allegations must be reported and recorded promptly and accurately so commanders can make sound decisions. When reporting does not occur in an accurate, timely manner, evidence that may be critical to clearly establishing the facts could be tampered with or lost.

Through cases studies, discourse with the Services, and interviews with commanders and staff officers, the Subcommittee examined the existing U.S. mechanisms through which incidents of suspected civilian casualties on the battlefield are reported and investigated. The Subcommittee also considered whether improvements can be made upon the speed, thoroughness, and accuracy of reporting.[29] Additionally, the Subcommittee considered ways to improve cooperation with local law enforcement and local communities in deployed areas to enhance the quality of reporting. The Subcommittee also considered the extent to which improvements in reporting processes over time have or have not been incorporated into permanent policy, tactics and procedures to ensure those improvements endure.

[29] The July 30, 2012, letter from the Secretary of Defense (see Appendix I) required the Board to review and assess "military justice in cases of U.S. Service members alleged to have caused the death, injury, or abuse of non-combatants in Iraq or Afghanistan." The Secretary's letter included a footnote after the word "abuse" that read as follows: "[a]lso commonly referred to as 'law of war violations,' see Department of Defense Directive (DoDD) 2311.01E." Although the Board understands the Secretary is concerned about cases involving law of war violations, the Board interprets the Secretary's tasking to address all cases involving death, injury or abuse of civilians [except certain specific types of cases specifically excluded by the Secretary], even those that do not constitute law of war violations. Department of Def. Directive 2311.01E, DoD LAW OF WAR PROGRAM (9 May 2006) (canceling DoDD 5100.77, DoD Law of War Program (9 Dec. 1998)) [hereinafter DoDD 2311.01E] prescribes the Department of Defense (DoD) Law of War Program, and defines "law of war" as follows: "That part of international law that regulates the conduct of armed hostilities. It is often called the "law of armed conflict." The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law." In light of this language, the terms "law of war" (LOW) and "law of armed conflict" (LOAC) will be used interchangeably throughout this report.

5.2 Civilian Casualty Reporting in Iraq and Afghanistan

Allegations of civilian casualties in Afghanistan and Iraq have been reported through multiple channels and under multiple requirements. Commanders and staffs at all levels are required, formally and informally, to provide a broad variety of information through operational command channels that higher-level decision-makers need to stay informed and respond appropriately. These requirements include information related to civilian casualties. Significant action ("SIGACT") reports, situational reports ("SITREPs"), criminal investigation reports, commander's critical information requirement ("CCIR") reports, and LOAC reports are all required by directive or instruction.[30] Sometimes reports flow simultaneously through multiple channels, such as command, operational, intelligence, and legal channels. Ultimately, the nature of the event – or an individual's perception of the nature of the event -- dictates the flow.

5.2.1 Operational Reporting

The Chairman of the Joint Chiefs of Staff ("CJCS") Manual 3150.03D, Joint Reporting Structure Event and Incident Reports, establishes procedures for a system of standard reporting in connection with Operations Event/Incident Reports ("OPREP-3"). Although the USCENTCOM Commander reports some OPREP-3 information to the Joint Staff by way of direct email to the Chairman of the Joint Chiefs of Staff, USCENTCOM primarily uses the Combined Information Data Network Exchange ("CIDNE") database to collect and distribute source information from SIGACT reports to higher headquarters (Joint Staff).

CIDNE was stood-up in 2006. Prior to this, DoD was meeting all U.S. treaty obligations with respect to LOAC reporting, but USCENTCOM did not collect SIGACT information, including LOAC violation information, in a reliable manner. It is unclear how SIGACT incidents were reported and recorded from

[30] SIGACTs and SITREPS are required by CJCSM 3150.05D, OPNAVINST 3100.6J, AFI 10-206, and MCO 3504.2. Criminal investigation reports are required by CIDR 195-1, SNI 5430.107, AFI 71-101, AFI 31-206, and AFI 90-301. CCIRs are issued through commander/unit directives. LOAC reporting is mandated by the four Geneva Conventions of 1949, DoDD 2311.01E, CJCSI 5810.01D, SNI 3300.1C, AFI 51-401, and MCO 3300.4.

2001 to 2003 when systems were first being developed and formally implemented. Although in 2006, USCENTCOM directed Multinational National Force-Iraq and U.S. Forces-Afghanistan to import historical SIGACT incidents into CIDNE, the comprehensiveness of the uploaded data from 2003 to 2006 remains uncertain. The quantity and quality of the reports produced in Iraq and Afghanistan from 2001 through the present increased significantly over time. This is attributable to increased experience, improved capabilities, improved reporting systems and a more established battle rhythm. The improvement progression was assisted by refined information data fields being added to the CIDNE database over time.

Multi-National Force-Iraq used CIDNE until the conclusion of operations in Iraq, and U.S. Forces-Afghanistan currently uses the system. In addition to serving as the primary SIGACT database, the CIDNE system is relied upon to capture LOAC violation reports. The database fields primarily capture the "5 W's" (Who, What, Where, When, Why) of an incident. Variations in report specificity within the system depend on the type of report required, the nature of the incident involved and the logical need for detailed information. CIDNE uses drop-down menus and fill-in-the-blank boxes. Higher headquarters elements can supplement, edit, and add new data fields to reports within the system.

CIDNE is a searchable database; however, USCENTCOM experts must conduct and searches within the database using a software program called Web-Enabled Temporal Analysis System ("WEBAS") that finds and analyzes data in the database.[31] Written responses received by the Subcommittee indicate that the database can be cumbersome, time consuming, and questionable with respect to completeness, particularly when searching for a consolidated report of specific information.

[31] WEBAS experts write programs (parameters) that enable specific searches and refine results to ensure maximum accuracy in end product reports. WEBAS experts then "normalize the data," and thereby try to insure all relevant records are included in reports issued by USCENTCOM. Normalizing data requires the standardization of abbreviations and nearly identical/synonymous entries (i.e.: Iraqi, IRAQI, IRQ, IR, IRNAT, etc.). Additionally, WEBAS experts account for missing information, organize extra information, and add and modify data fields over time. Normalizing these differences helps ensure the fidelity of the information and inclusion of all relevant entries in USCENTCOM reports.

In addition to developing concerns with respect to the CIDNE database, the Subcommittee questions how reports in general, including LOAC reports, are maintained and tracked at higher levels. Although reports are made, tracked, and transmitted in theater, the Subcommittee was unable to determine through testimony how, for example, reports sent from USCENTCOM to Washington, D.C., are maintained or tracked. Ultimately, the Subcommittee was unable to obtain information to answer this question. It appears reports in general are not maintained or tracked at the highest levels of command in a reliable database that is easily searchable. It appears reports received by the highest levels of command are addressed as they arrive, but not archived in an effective way.

5.2.2 LOAC Specific Reporting

The four Geneva Conventions of 1949 establish the baseline for LOW or LOAC violation reporting.[32] DoD policy underscores the need for compliance with the law of war, including reporting violations of the law of war, during all armed conflicts and in all other military operations.[33] DoD requires the Military Departments to develop internal policies and procedures to support the DoD Law of War Program.[34] The Chairman of the Joint Chiefs of Staff, USCENTCOM, and each of the Services have implemented instructions that comply with this requirement.[35]

[32] Geneva Conventions I-IV, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287.
[33] DoDD 2311.01E, para. 4.1.; CJCSI 5810.01D.
[34] DoDD 2311.01E
[35] See Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01D, Implementation of the DoD Law of War Program (30 Apr 2010). While (CJSCI) 5810.01D and other policy require reporting through command channels, they do not impose specific reporting requirements regarding OPREP-3, LOAC violations, or civilian casualty incidents of any kind. Further, CJSCI 5810.01D provides no cross reference to the Chairman of the Joint Chiefs of Staff Manual for Joint Reporting Structure, (CJSCM) 3150.03D. See also USCENTCOM Regulation (CCR) 27-1, Law of War Program (8 Sep 2008); U.S. Dep't of Army, Field Manual 27-10; Secretary of the Navy (SECNAV) Instruction 3300.1B, Law of Armed Conflict (Law of War) Program to Ensure Compliance by the Naval Establishment (27 Dec 2005); Air Force Instruction 51-401, Training and Reporting to Ensure Compliance with the Law of Armed Conflict (11 August 2011); Marine Corps Order (MCO) 3300.4, Marine Corps Law of War Program (20 Oct 2003)(The Marine Corps Law of War program provides Marines with specific guidance on the identification and reporting of purported war crime violations. This MCO requires all personnel (including company-level personnel and civilians assigned to or accompanying Marine forces) to report "reportable incidents" to their chain of command (both operational and service chains), an Inspector General, Judge Advocate, or Chaplain as soon as practical. Moreover, operational and strategic-level commanders normally promulgate amplifying reporting and processing guidance in the form of fragmentary orders to the Operational Order or Operational Plan. The MCO instructs commanders on immediate actions and reporting procedures for alleged reportable incidents.

Each Service instruction specifically requires the reporting of "reportable incidents." This term is broadly defined as "possible, suspected, or alleged violations of the law of war for which credible information exists."[36] Thus, all U.S. Service members have a broad reporting responsibility and an obligation to report conduct committed during military operations that would constitute a violation of the law of war if it occurred during an armed conflict, so long as they determine that there is credible information to that effect. Specifically, the DoD Law of War Program requires the following:

> All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action.
>
> All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities. Once it has been determined that U.S. persons are not involved in a reportable incident, an additional U.S. investigation shall be continued only at the direction of the appropriate Combatant Commander. The on-scene commanders shall ensure that measures are taken to preserve evidence of reportable incidents pending transfer to U.S., allied, or other appropriate authorities.[37]

This language is echoed almost exactly by the corresponding CJCS Instruction (CJSI 5810.01D) and USCENTCOM Regulation (CCR 27-1).[38]

Ultimately, all operational reporting requirements assist in the detection and reporting of LOAC violations. The Secretary of the Navy categorized all operational reporting requirements as means "designed to alert the commander and the operational chain of command to alleged law of war violations as soon as any U.S. forces become aware."[39]

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[36] Id.
[37] DoDD 2311.01E, para 4.4 - 4.5
[38] Because this report concerns matters that have taken place in Iraq and Afghanistan since 2001, this section will focus on reporting requirements outlined in CCR 27-1 to the extent that it differs from the other instructions referenced above.
[39] Letter from Secretary of the Navy, Ray Mabus, to the DLPB, 11 December 2012.

The USCENTCOM Law of War Program provides guidance to Service members under USCENTCOM's authority regarding the identification and reporting of purported war crimes. Although CCR 27-1 defines reportable incidents as that term is defined by DoD and identifies general responsibilities, it does not prescribe any specific reporting format or method. Paragraph 6 of CCR 27-1 outlines general responsibilities of USCENTCOM, its component commands, and its joint subordinate activities. Among other things, it requires the implementation of programs to prevent law of war violations, and mandates periodic review of plans, policies, directives, and training programs. Additionally, it requires a central collection of reports and investigations of reportable incidents.[40]

Paragraph 7 of CCR 27-1 identifies "Investigating/Reporting Violations of the LOW." It details the duty to report incidents, send initial reports, conduct investigations, and submit these reports through Service channels and to USCENTCOM. CCR 27-1 designates investigation of LOW reports as the responsibility of commanders. Commanders must report all reportable incidents to appropriate Service investigative agencies – MCIOs. Where the appropriate Service MCIOs cannot or will not investigate, commanders are required to conduct investigations themselves.

When USCENTCOM receives a report, it has the responsibility to "submit a message report, as expeditiously as possible" to the Joint Staff, the Office of the Secretary of Defense ("OSD") and the Secretary of the Army ("SECARMY") as the Executive Agent for the DoD Law of War Program. Additionally, USCENTCOM must provide "all incident reports and [LOW violation] reports of investigation."[41]

[40] The CCR requires USCENTCOM and "joint subordinate activities to...provide for the central collection of reports and investigations of reportable incidents..." (para. 6(c), page 2). Based on information obtained from the USCENTCOM SJA, however, it does not appear USCENTCOM maintains this information at the level contemplated by this provision.
[41] CCR 27-1, para. 7e(1)and(2).

In 2009, USCENTCOM issued two fragmentary orders ("FRAGOs") related to LOAC incident reports and "legal reporting."[42] USCENTCOM issued the FRAGOs because of perceived "lack of timely notifications and spotty recurring reports."[43] The FRAGOs established timeline requirements for reports and described the information expected to be included in LOAC reports. For example, the FRAGOs required reporting units with knowledge of a suspected LOAC violation to transmit information to USCENTCOM within two hours through the Service component and operational chains of command, irrespective of accuracy or detail. Follow-up was also required within 24-48 hours with expanded information. The FRAGOs also required formal and informal investigations to be forwarded to the USCENTCOM Staff Judge Advocate as soon as available and before submission to organizations outside the USCENTCOM area of responsibility ("AOR"). The FRAGOs mandated that initial and subsequent reports contain the "5 W's" of the incident and additional, operationally relevant data. Further, the FRAGOs clarified the USCENTCOM requirement for weekly Judge Advocate activity reports, and mandated that ARCENT (Army Central) maintain a generic email address to receive LOAC reports.

As indicated above, the "DoD Law of War Program" requires prompt reporting and investigation of "reportable incidents" which are possible, suspected, or alleged violations of the law of war for which credible information exists. However, a number of witnesses before the Subcommittee testified that the idea of reporting a possible law of war violation can be intimidating, and that the "label" itself can chill reports, regardless of the nature of the conflict. Substantial testimony also suggested that small unit internal loyalty in a combat environment can cause reluctance to report incidents.

[42] CFC FRAGO 09-683 LOAC/FF/LEGAL REPORTING; CFC FRAGO 09-707, MOD 3, CENTCOM DETENTION OPERATIONS RESPONSIBLITIES.
[43] CFC FRAGO 09-683 LOAC/FF/LEGAL REPORTING.

The Subcommittee concluded that current LOAC reporting policies are sufficient to comply with U.S. treaty obligations and DoD policy.[44] Moreover, commanders and judge advocates indicated that the reporting policies are understood by the chain of command and trained throughout the force. Accordingly, the Subcommittee concludes that Service members and commands possess and generally understand these broad but identifiable LOAC reporting requirements.

The Subcommittee understands, however, that no DoD-wide, established methodology for reporting suspected LOAC violations exists. Rather, DoD relies upon a variety of Service and combatant commander-specific processes. These variations reduce the certainty with which higher levels of command, including the Secretary of Defense, assisted by the Joint Staff, receive reports and information that meets common criteria for reporting.

Experienced commanders before the Subcommittee consistently reinforced the importance of knowing about and investigating all allegations, regardless of source. Senior commanders provided testimony to the Subcommittee indicating that unlikely sources of information concerning alleged civilian casualties frequently proved correct. Their experience indicated that even allegations from questionable sources often had some basis in fact. As one commander noted, it became apparent to him that he couldn't rely only on "sensors wearing my uniform."[45]

Further, as discussed later in this report, the "credible information" criterion leaves open the potential for natural bias to preclude reports, for example, in a case where a suspected combatant makes a report but a Service member or coalition forces partner denies an incident occurred, or a leader wants to give a subordinate the benefit of the doubt. Moreover, even in doubtful situations, comprehensive reporting and investigation protect individual Service members,

[44] There are a number of Service-level publications on the LOW. DoD Directive 2311.01E provides for a DoD Law of War Manual, and DoD is working towards publishing a DoD Manual in 2013. The Subcommittee applauds these efforts and encourages the adoption of the manual, which will serve as an important reference and teaching tool for policy makers, operators and attorneys.
[45] BGen Paul J. Kennedy, USMC, DLPB Subcommittee Meeting, 9 January 2013.

as well as U.S. forces generally, if they are reported and subsequent investigation determines that the allegations are unfounded or that the actions were justified under the law of war. The ability to credibly dispel unfounded allegations is of the utmost importance, especially in a non-linear battlespace.

5.3 What Should be Reported

Senior commanders in Iraq and Afghanistan have come to appreciate the adverse impact civilian casualties can have on the mission, regardless of whether they are the result of unlawful conduct. [46] Experienced commanders consistently expressed the importance of investigating all allegations, regardless of source, because even allegations from questionable sources can have basis in fact. In the latter stages of operations in both Iraq and Afghanistan, all suspected civilian casualty events associated with the U.S. military, regardless of origin of the reports or apparent nature of the events, were reported through operational channels to the joint force commander.[47] These processes evolved from lessons learned incrementally. Although they have been incorporated into CENTCOM procedures, notably in CCIRs for these areas of operations, the Subcommittee found that these lessons have not yet been effectively captured and integrated into formal DoD-wide policies and procedures.

The testimony and information we received made it clear that documenting all alleged civilian casualties, especially in low-intensity or COIN environments, provides many benefits. Reporting allows commanders: to determine the facts reliably; dispel false claims or accusations; correct operational or procedural shortcomings; provide effective prompt restitution to survivors and support for victims; address misconduct; promote the effective uninterrupted conduct of operations; and provide transparency at all stages. The Subcommittee recommends that these lessons be captured and integrated into Joint doctrine and implemented into Service regulations.

[46] As indicated above, "civilian casualty" is defined for the purpose of this report as the death, serious injury or abuse of a local national civilian due to the action of U.S. or Coalition forces in a combat environment.
[47] By contrast, the U.S. Military COIN Manual provides for the immediate investigation of "all allegations of immoral or unethical behavior." Paragraph 7-10.

Deliberate planning for any campaign should include detailed joint guidance appropriate to the operating environment and area of operations for reporting through operational channels, investigation, and UCMJ/administrative disposition of alleged or discovered incidents of civilian casualties from military operations. DoD deliberate and contingency planning guidance should be amended to ensure these matters are adequately addressed at the planning stage, and to ensure that joint force commanders are presented with appropriate options and an informed opportunity to decide how suspected civilian casualties will be addressed in each joint mission or area of operations.

Accordingly, whenever possible, especially in COIN operations, doctrine and deliberate planning should require notice of civilian casualties to senior operational commanders immediately or as soon as circumstances permit, in a manner prescribed by the senior joint force commander. Notification of civilian casualties should be made at least to the first GCMCA in the operational chain of command, and to the Geographic Combatant Commander. Provisions should be made for all potentially significant incidents, or allegations of misconduct related to civilian casualties, to be reported through command channels to the combatant command level, to allow for command oversight and opportunity for each level of the command chain to exercise authority over the matter should such commanders determine that to be appropriate.

5.4 Obstacles to Reporting

Information received by command levels, all the way to the Commander-in-Chief, is largely dependent on initial reporting. Even in a perfectly structured reporting system, the speed, thoroughness, and accuracy of the reporting process depend entirely on information provided in the initial report. These initial reports often originate at the lowest organizational levels. When Service members at the point of contact or the initial leadership level delay reporting, fail to report, or provide inaccurate reports, the entire system fails.

Evidence exists that Service members at the point of contact or their leaders have been reluctant to inform the command of reportable incidents. This reluctance may be attributed to any number of potential factors including a feeling of justification in connection with the actions taken, fear of career repercussions, loyalty to fellow Service members or the unit, or ignorance. One survey of Marines and soldiers in Iraq reported that that only 40% of Marines and 55% of soldiers indicated they would report a unit member for injuring or killing an innocent non-combatant.[48]

Failures can occur at any level. A Service member observing a civilian casualty may believe it does not amount to a "reportable incident" and fail to report it to superiors. Individuals may not want to report misconduct involving their comrades. Individuals involved in reportable incidents themselves may fear personal consequences connected to reporting. Commanders may question events, but conclude that nothing problematic occurred, and then fail to report an incident. Leaders engaged in war-fighting may not want to be distracted with allegations they believe will inevitably prove to be unproblematic or unsubstantiated. Individuals may feel they are bypassing "unnecessary" work by not reporting. Service members may lack confidence in "the system" to fairly investigate and exonerate when the facts warrant.

Commanders reported the difficulties faced in training subordinates to appreciate that investigations are tools used to dispel unfounded allegations of misconduct, as well as tools used to achieve accountability. Although the Subcommittee heard testimony suggesting the unwillingness of Service members to trust individuals outside their unit to fairly investigate or understand the circumstances of a particular incident, testimony also indicated that more

[48] This reluctance to report is reported in a 17 November 2006 survey conducted by the Office of the Surgeon, Multi-National Force-Iraq and the Office of the Surgeon General, U.S. Army Medical Command. The survey appeared in a publication entitled, Mental Health Advisory Team IV, Operation Iraqi Freedom 05-07. A chapter regarding battlefield ethics conveyed information obtained during the survey, which encompassed responses from Soldiers and Marines. Among other things, the report claimed that 7% of Marines and 4% of Soldiers who deployed to Iraq and participated in the survey admitted to hitting or kicking at least one non-combatant when it was not necessary. In response to the survey, General Petraeus, then-Commanding General, Multi-National Force Iraq, issued a letter to the service members in his charge expressing his concern about the apparent reluctance to report.

experienced commanders appreciate the potential benefits of impartiality and credibility brought by outside examination.

Reporting is the key to transparency. Reports and investigations create records and, if done properly, accurately document events. In this sense, reports and investigations can be important tools in combating enemy misinformation and media campaigns.

By reporting, commanders record facts, circumstances, and the perspectives from which decisions are made. When commanders question events, they highlight an expected level of conduct and demonstrate that their units are not above scrutiny. Commanders who provide fast, thorough, accurate reports, and demand the same of their units, demonstrate their expectations regarding adherence to the law of war and reinforce battlefield ethics. Those who neither provide fast, thorough, accurate reports, themselves, nor demand the same of their units, send the opposite signal.

5.5 Enablers to Thorough, Prompt, and Accurate Reporting

5.5.1 Training, Mentoring, and Exercises

Training and redundant operational oversight regarding LOAC recognition and reporting can reduce reporting failures or omissions. Examples of such oversight can be seen in the multiple institutional corrections, including increased training at all levels, the Marine Corps made in response to the events that transpired in Haditha, Iraq, on 19 November 2005.[49] For example, the Marine Corps improved the structure by which it embeds judge advocates, mandated that battalion judge advocates join units during work-ups, prior to deployment, and greatly improved its training and deployment requirements to ensure that

[49] See Haditha case study in Appendix V. Specifically, the Marine Corps instituted a Pre-deployment Training Program (PTP) focused on legal and ethical matters. The Marine Corps then issued an administrative message requiring entry-level PTP training for all new Marines - officer and enlisted, follow-on PTP and LOW training at all formal and unit run schools, specialized LOW training for all personnel involved with planning combat operations, and detailed legal training for all new judge advocates. Additionally, the Marine Corps enhanced its legal and ethical training for all units participating in Mojave Viper/Spartan Resolve before deploying to Iraq or Afghanistan.

battalion judge advocates have the expertise required to advise commanders on DoD and Marine Corps LOAC policies.

The Subcommittee received testimony from witnesses who attested to the benefit of training. Virtually all witnesses agreed that a moral, ethical command climate in combat that inculcates and maintains U.S. values despite the difficulties of the mission or the particular area of operations is the single most important factor in preventing civilian casualties, ensuring civilian casualty reporting, and appropriately addressing reported incidents. Individual commanders, at all levels, together with their non-commissioned officers, have a great responsibility in this regard. No substitute exists for ethical leadership manifested by the provision of training in garrison and throughout deployments. Such training should demonstrate ethical responses to civilian engagements, including incident reporting and investigations, and engender trust that civilian casualty investigations are used to determine facts, and not just to uncover misconduct. Such command engagement and mentoring, particularly at the lower levels of command enable Service members to overcome inclinations to put small unit loyalty above loyalty to ethical values.

BG Gary Volesky[50] testified before the Subcommittee that the key to avoiding civilian casualties is "clear leader engagement and training." [51] He explained that he enjoyed success on the battlefield because he and his subordinate leaders constantly coached, taught, and mentored. BG Volesky stated that he often approached junior soldiers in garrison and in theater. When he did so, he asked soldiers to explain how they decide to engage the enemy. When soldiers indicated they first asked themselves three questions; "can I, should I, must I," BG Volesky knew the soldiers had been trained properly. When he did not receive acceptable answers, BG Volesky mandated training for the entire unit. He conveyed that leaders, including senior commanders, must

[50] BG Volesky has extensive deployed command experience. Prior to his current assignment as the USA Chief of Public Affairs, he served as the Commander, 2nd Infantry Battalion, 5th Cavalry, 1st Cavalry Division, Iraq; Commander, 3rd Heavy Infantry Brigade Combat Team, 1st Cavalry Division, Afghanistan.
[51] BG Gary Volesky, USA, DLPB Subcommittee Meeting, 9 January 2013.

constantly and unrelentingly train, retrain, supervise, engage, and mentor. His testimony highlighted the absolute need for training.

LtGen Richard Mills,[52] COL John Richardson,[53] COL Timothy MacAteer,[54] and COL David Hill[55] all underscored the importance of training and the incorporation of civilian casualty training scenarios into exercise events. Doing so emphasizes that civilian casualty reporting is a routine, expected part of combat and that reporting need not be feared. Testimony also underscored the importance of continuing such training while units are deployed, to help address the potential corrosive effects of combat.

The Subcommittee concludes that battlefield ethics and civilian casualty reporting requirements (and the reasons they are important) must be the subject of frequent, ongoing training, mentoring, and exercises. They are the only means of engendering true trust in the reporting and investigative process in every Service member. The Subcommittee recommends continuing to train and expand battlefield ethics / lessons-learned training curriculum extrapolated from after action reports (e.g. civilian casualty reporting, LOAC, military ethos, command climate), during all levels of PME, formal and informal school, exercises, and unit training. Ethical leadership should be trained to the lowest level in garrison and throughout deployments.

In the past, both the ICRC and respected NGOs concerned with civilian casualties have initiated meetings with combatant commanders, the Chairman of the Joint Chiefs of Staff and other entities. The Subcommittee views this as a best practice. The DoD should continue to invite the ICRC to participate in LOAC training during pre-deployment mission rehearsal exercises. DoD should also

[52] LtGen Mills has extensive command experience in Iraq and Afghanistan. He formerly served as Commander, 24th Marine Expeditionary Unit (SOC), Kosovo and Iraq; Commander, 1st Marine Division and Ground Combat Element, Al Anbar Province, Iraq; Commander, I Marine Expeditionary Force (Forward), Afghanistan; Commander, International Security Assistance Forces (ISAF) Regional Command (South West), Helmand Province, Afghanistan.
[53] Prior to his current assignment as Commander, 3rd Cavalry Regiment, COL Richardson served as Commander, 5th Squadron, 4th Cavalry Regiment, 1st Infantry Division, Baghdad, Iraq.
[54] COL MacAteer previously served as Commander, 2d Brigade, 82nd Airborne Division, Anbar and Baghdad, Iraq.
[55] COL Hill previously served as Commander, 1st Special Troops Battalion, 1st Brigade, 4th Infantry Division, Iraq.

provide input and feedback to ICRC and respected NGOs to strengthen compliance with the law of war. DoD should seek to identify areas in which we can work together with NGOs on shared policy goals and address communications with NGOs in the area of operations during campaign planning.

5.5.2 Importance of Confidence in Command and the Command-Centric Military Justice System to Obtaining Reports

It was apparent to the Subcommittee that a command-centric military justice system, in which disciplinary decisions are made by a commander in the chain of command, is essential in establishing and perpetuating a deeply seated trust in the reporting and investigative process. LtGen Mills told the Subcommittee "the bond of loyalty at the squad level is mythical," and only a strong chain of command known to be open and fair can overcome it. Otherwise, this loyalty can lead a Service member to ignore or mischaracterize a questionable event. Discussing the role of the commander, BGen Paul Kennedy[56] testified, "you're supposed to be the moral compass"[57] and that there is an obligation to "paint the fullest picture of what's going on inside of these little micro-battlespaces."[58] He observed that an "emotional brittleness" can develop among troops who have suffered significant casualties, that "is going to be amplified by the time it gets down to that private who's 18 years old and does not have the maturity, the experience, or the support, to help him make the right decision." Only by "circulating the battlefield … especially with the units that have been traumatized, and talking to these guys about what the expectation is and showing sympathy, but not offering an excuse, then those things don't happen."[59] He explained,

> And the minute you catch wind that something has gone wrong, you get a sense when you visit that people are holding their breath. The Marines are holding their breath to see what you're going to do because they have put in the green shield around, in many cases,

[56] BGen Kennedy previously served as Commander, 2nd Battalion, 4th Marines, 1st Marine Division, Ramadi Iraq; Command, 2nd Marine Regiment, Helmand Province, Afghanistan.
[57] BG Paul Kennedy, USMC, DLPB Public Meeting, 15 February 2013, Transcript, at 243.
[58] Id. at 248.
[59] Id. at 244-245.

> around the people that are perhaps [going to be] accused of those crimes. The population that's outside the wires is also holding its breath to see what you're doing. And so the minute you hear of it, you know the enemy's watching – he's putting out a counter-information campaign, that it's in your best interest to speedily either prove or dismiss those allegations.[60]

When Service members trust that reports are investigated and pursued fairly in a system responsible to their own commanders -leaders they know, understand, and with whom they train - they are more likely to comply with reporting requirements and provide accurate reports. BGen Kennedy and others explained that when commanders proved ineffective or failed to reflect the ethos expected of them that these commanders should be relieved. Such decisive, upper-level command reinforcing battlefield ethics actions have a positive effect on troops.

5.5.3 Judge Advocate Integration and Parallel Reporting

The Subcommittee's review of recent history and testimony from commanders demonstrated that non-linear operations require the use of dispersed smaller units operating independently on a much larger battlefield, far removed from higher echelons of command and legal support. Today, commanders of small units shoulder responsibility previously not exercised below battalion-sized units. The senior commanders who testified before the Subcommittee indicated that deployed judge advocates are particularly important in these environments. They support combat commanders in the field, and they have proven invaluable in the operational planning process and helping commanders discern and solve problems as they arise.

Every senior commander who testified emphasized the indispensability of judge advocates to them personally, and to their staffs and subordinate units. LtGen Mills told the Subcommittee that the two most important members of his staff were his lawyer and his public affairs officer, and he ensured they had direct access to him. Every senior commander emphasized the importance of co-

[60] Id. at 248-249.

locating judge advocates with combat commanders and units, particularly in non-linear COIN operations when relatively junior commanders, far removed from traditional in-garrison sources of legal support, exercise responsibility previously reserved to far more senior and experienced commanders. BG Volesky, talking about the difficulty of helping company commanders understand the challenges on the battlefield, called judge advocates "enablers" who help commanders see themselves and identify issues.

Embedding a legal advisor to support deployed operations at the battalion, or equivalent, level in all conventional units appears to be ideal, particularly given the unique debilitating effect a civilian casualty incident may have on the operational setting, and the unique training of judge advocates to assist commanders in responding to civilian casualty incidents. The commanders who testified before the Subcommittee indicated that embedding judge advocates with commanders who interact with local populations in the wake of incidents pays additional dividends in those interactions. Thus, during the joint planning process, a determination should be made, based on the operational environment, as to when additional legal support will be needed to support battalion, or equivalent level deployed operations. To the extent possible, this assessment should be made early enough to allow the legal advisor to train with the unit scheduled to deploy. Further, the Services should be adequately resourced to ensure that judge advocates are available to support deployed operations without degrading other missions.

In both Iraq and Afghanistan, the Marine Corps placed judge advocates at the battalion level without increasing the overall size of the judge advocate community. Marine commanders who spoke with the Subcommittee have firmly endorsed that step. By contrast, the Army places three judge advocates at the higher brigade-level in conventional units, and but assigns judge advocates to Special Forces battalions. MG Anthony Cucolo,[61] agreed that judge advocates

[61] MG Cucolo previously served as Assistant Division Commander (Support), 10th Mountain Division (Light) with duty as Director, Combined Joint Staff, CJTF-180, Afghanistan; Commander, 3rd Infantry Division (Mechanized)/Multi-National Division-North, Iraq.

should be assigned to deployed battalions.[62] After considering the insight provided by multiple senior commanders, the Subcommittee concludes that a legal adviser should be embedded with all conventional battalions to support deployed operations and enhance the commander's ability to distribute and receive information throughout the operational environment.

Further, the Subcommittee agrees with the unanimous sentiment of commanders and judge advocates who testified that legal advisors must train with the units with which they deploy. Further, they need to be attached or assigned to the unit in advance of a deployment to become integrated in the staff. Judge advocates provide the greatest value when their deployed duty is an extension of their duty at their home station. The testimony of one judge advocate that "commanders' views of military justice are shaped by experience in garrison"[63] was echoed by a commander who related, "The beauty of it was, I was able to develop a relationship with all of them at my post, so when I deployed into combat, I didn't have to … build a relationship with someone that I haven't been living with the previous twelve or fourteen months preparing to go to combat."[64]

The speed, thoroughness and accuracy of reporting improved when civilian casualty incidents were simultaneously reported through multiple channels, including operational and legal channels. Judge advocates assigned to battalions, brigades, and regiments report directly to their corresponding commanders; however, they also maintain dotted-line reporting responsibilities to staff judge advocates at higher levels of command. The Services developed this practice as a guard against breakdowns in judgment or communications that may impede information flow. This reporting practice effectively provides a safety net for commanders. When commanders and judge advocates are well trained in battlefield ethics reporting and investigation are more likely to occur.

[62] MG Anthony Cucolo, DLPB Subcommittee Meeting, 9 January 2013
[63] LTC Jeff Hagler, USA, DLPB Subcommittee Meeting, 1 October 2012.
[64] BG Gary Volesky, USA, DLPB Public Meeting, 15 February 2013, Transcript, at 133.

5.5.4 Elevating Responsibility to Characterize Civilian Casualty Incidents as Possible LOAC Violations

While current LOAC reporting requirements comply with U.S. treaty obligations and DoD policy, they do not suffice to ensure that commanders receive all the information they need to command. Further, the "LOAC" label may inhibit reporting.

Whether a civilian casualty implicates LOAC is less important to a commander than the fact that a civilian casualty occurs as the result of U.S. operations, even when the casualty is an accident or otherwise justifiable. Whatever the circumstances, a commander must examine and remediate the adverse impact a civilian casualty incident may have on relations between the combined forces and the local population and host nation. A loss of a family member is a grievous matter regardless of LOAC characterization, and rapid demonstration of concern and recompense can reduce the impact.

Branding an incident with the "LOAC" label at the outset of the reporting process requires a reporting unit and chain of command engaged in the very conduct that is the subject of the report to acknowledge the possibility that a serious international crime may have been committed. In this sense, the "LOAC" label may have a chilling effect on reporting. The 3/1 Battalion Commander's reluctance to accurately report and thoroughly investigate the 19 November 2005 Chestnut/Viper incident at Haditha, Iraq, illustrates such concerns. His false report, failure to investigate, and insistence that "[his] men [were] not murderers" underscores the impact the "LOAC" label can have, even on an experienced commander.[65]

Moreover, the LOAC label can cause excessive analysis of the actual reporting requirement. The DoD definition for "reportable incidents," replicated in all other relevant guidance, relieves individuals of the reporting requirement if they conclude that information received is not credible. This report-limiting criteria is too subjective and susceptible to invocation at an initial stage of

[65] See Appendix V.

consideration to insure responsible commanders receive appropriate information. This highly subjective standard can provide individuals with an excuse for not reporting.

As such, civilian casualty incident reporting should be required regardless of the apparent credibility of the information source, or whether such incidents appear to constitute LOAC violations, when the mission permits. Furthermore, mission permitting, determination of LOAC reportable incidents should be made at the command level directed by the responsible GCMCA, but at no lower level than an O-6 commander with a judge advocate on his or her staff. This will promote prompt and complete reporting so the command chain will learn of and have opportunity to assess all civilian casualty events, whether or not they constitute LOAC violations. The assessment of whether a civilian casualty incident is a possible LOAC violation reportable under the DoD Law of War Program should be a separate determination from the civilian casualty report and investigation requirement. These requirements are especially important in a COIN operation.

Relieving reporting units of the need to characterize an event, together with routine investigative processes that are not focused on criminality can lessen impediments to timely reporting. Incidents can be reviewed at higher echelons of command where legal and command resources are best positioned by relative detachment to make an initial assessment regarding the character and implications of an incident. Where it appears a LOAC violation may have occurred, a review at a higher level will ensure that investigative steps are consistent with LOAC reporting requirements.

These views reflect the actual policies of senior commanders in Iraq and currently prescribed in Afghanistan. In Afghanistan, COMISAF Tactical Directive 5.1 emphasizes the importance of minimizing civilian casualties and standard operating procedures ("SOPs") and FRAGOs require the reporting and tracking

of civilian casualty incidents.[66] ISAF ("International Security Assistance Force") and USFOR-A leadership prescribe civilian casualty information as a CCIR.

ISAF SOP 307 mandates that all units provide reports through the chain of command to a Civilian Casualty Mitigation Team. An initial "5 W's" report is due within two hours of an incident, followed by storyboards, including information regarding consequence management, due within six hours. At that point, further inquiry can develop the facts.

Comprehensive reporting procedures relating to civilian casualties in Iraq and Afghanistan have garnered praise from nongovernmental organizations;[67] however, these policies have not been incorporated into DoD doctrine. They should be, and the DoD Law of War Program should be reassessed to ensure currency and consistency with best practices.

[66] International Security Assistance Force (ISAF) SOP 307, ISAF Civilian Casualties Handling Procedures; HQ, ISAF FRAGO 221-2008, Civilian Casualty Reporting, 24 Jul 08; HQ ISAF Operational Reports and Returns SOP; HQ ISAF Incident Response Planning Team SOP; and USFOR-A FRAGO 12-241.
[67] Ms. Sarah Holewinski, Center for Civilians in Conflict, and Ms. Daphne Eviatar, Human Rights First, DLPB Public Meeting, 7 November 2012, Transcript, at 134-145.

6.0 Inquiry, Assessment, and Immediate Response

6.1 Introduction

While it is clear that civilian casualty incidents require some form of initial inquiry, followed by a determination of the extent and type of additional factual analysis and reporting needed, there are differences among the Services regarding the types of administrative and criminal investigations, the criteria and authority for doing them, and the procedures and criteria for them. Service differences between "inquiry," "commander-directed-investigation," "administrative investigation," and "criminal investigation" among others, are not well-understood across Services or within joint commands. This is aggravated by "short-hand" descriptions traditionally used that arise from Service regulations or publications dealing with the matter. The lack of clarity can be significant because, as a practical matter, joint commands must rely on Service resources and processes for such fact-determination processes. For purposes of this report, general descriptors are used rather than Service-specific references.

6.2 Preliminary Inquiry

In military operations, especially COIN, or other suitable operational environments, and tactical considerations permitting, doctrine and deliberate planning should require commanders to conduct an uncomplicated, prompt, initial fact-finding inquiry, in civilian casualty cases to determine the readily available facts, likely cause, and extent of U.S. or coalition force involvement.

Experience in Iraq and Afghanistan demonstrated that the key to transparency and the foundation for follow-on action is a rapid, preliminary inquiry to confirm the "5 W's" in initial reporting. The requirement for a preliminary inquiry in every civilian casualty incident involving death or serious injury became a best practice. LtGen Mills related that reports of civilian casualties and a preliminary inquiry were due to him as a Regional Commander

in Helmand Province within 24 hours. In practice, these have not been formal investigations, but best-available-at-the-time fact gathering by the affected organization. Their purpose was to find the facts to inform higher echelons but they can also serve as an initial after-action assessment to improve tactics, techniques, and procedures. Like the theater initial reporting requirement, they have been required in all cases, resulting in routine incorporation into unit operating policies. In practice, the inquiry has usually been initiated at the battalion level, either by the battalion involved in the incident or by a sister battalion.

An initial inquiry into civilian casualty incidents should be followed by a determination as to the extent and type of additional investigation that may be needed. Because preliminary inquiries have been routine and often have been conducted within the tactical organization by personnel with whom unit members may be familiar, and have not been based on a presumption that a criminal act had occurred, unit members have been said to be more likely to be candid. The preliminary inquiry has been made a matter of record in some fashion and forwarded to a level of command where it can be reviewed and a determination made whether further investigation is necessary, typically at the GCMCA level. Current practice is to retain preliminary inquiries for some time, but not a prescribed period, should questions later arise about the incident.

In significant incidents in which the command recognizes that additional inquiry is required, incident assessment teams (IAT) have been dispatched to assess the incident and provide more in-depth information to assist in determining the way ahead. These inquiries also help commanders discuss the incidents with the host nation leaders and determine whether a criminal investigation or other formal investigation is necessary. Keeping the host nation civilian leadership and population informed of ongoing investigations and outcomes is critical to operational success. Although these practices have proven effective, and are now consistently accomplished within the Afghanistan

area of operation, the practice has not yet been incorporated in DoD doctrine. They should be; future doctrine should include holistic consequent management solutions such as the IAT concept as a best practice.

6.3 Additional Assessment When Appropriate, in Coordination with Local Authorities

Serving as a Regional Commander in Helmand Province, Afghanistan, LtGen Mills indicated that his first notification of a civilian casualty was to the provincial governor, and the second call was to higher headquarters. He assigned an experienced O-6 infantry officer to the combat operations center, virtually full time, to read operational reports and detect anomalies. Incidents would prompt launching a tiger team – available 24/7 and comprised of legal, tactical, and MCIO experts – to deploy to an incident site, which occurred on average once a week. Local authorities would be invited to provide a representative to these tiger teams.

In the summer of 2008, ISAF headquarters established a Civilian Casualty Tracking Cell ("CCTC") to enable commanders to better monitor harm caused upon civilians. Then, in July 2011, ISAF created a Civilian Casualty Mitigation Team ("CCMT") to oversee the CCTC, analyze civilian casualty trends, and advise COMISAF on the reduction of civilian harm.

Further, U.S.-led coalition forces in Afghanistan created IATs as tools for investigating civilian casualty incidents, particularly high profile incidents.[68] The teams access provincial units quickly and efficiently investigate civilian casualty allegations. ISAF SOP 307's reporting requirements develop the particulars of an incident with initial reporting within two hours of an incident followed by more detailed information from the unit within six hours. First impression reports with known facts and immediate and planned responses are due within 48 hours.

[68] The "IAT" is shorthand for various forms of incident assessment teams including the term "JIAT" (joint incident assessment team) and RIAT (Regional Incident assessment team or Rapid incident assessment team). The JIAT can refer to a higher level IAT (convened by a joint level commander). RIAT is usually assembled at the regional commander level.

Civilian casualty assessment reports that include a review of the facts, post incident response, identified lessons learned are due within six days. Finally, incident assessment reports must be submitted to Headquarters ISAF within 30 days of IAT activation.

The principal function of the IAT is to examine quickly the incident, report back to the commander, and facilitate interaction with the local population. In Afghanistan, the IAT is often a standing team with many members, not all of whom deploy for every incident. The IAT team composition is tailored to the initially reported facts of the incident. For example, if the civilian casualty involves an aviation asset, an aviator is included. If the incident involves artillery, likewise, a field artilleryman is included. The team is usually made up of a team leader (an officer in the grade of O-5 or O-6), a lawyer, a public affairs officer, a subject matter expert, and a local expert/investigator or leader who was chosen by the host nation. Ensuring that someone from the host nation is a member of the IAT team helps establish buy-in into the inquiry and trust in the outcome of the fact-finding process, helps deflect negative information operations by insurgents regarding the civilian casualty, and aids in establishing a sense of trust among the people we are there to empower. The IAT is a flexible, expert device that is an ideal bridge from preliminary inquiry to investigation and the Subcommittee recommends it be included in future doctrine as a best practice.

In response to lessons learned since 2001, the U.S. now analyzes trends regarding civilian casualties, makes appropriate adjustments as necessary, and responds better to civilian casualty reports post-incident. It is important to note that these reporting requirements capture all significant incidents involving civilians, necessarily including those that involve LOAC violations. In 2011, the Department of the Army published Army Tactics, Techniques, and Procedures ("ATTP") 3-37.31, Civilian Casualty Mitigation. This Service-specific doctrinal publication provides guidance for minimizing civilian casualty incidents and managing their consequences. It does not, however, mandate any specific civilian casualty reporting procedures. In June 2012, The Center for Army

Lessons Learned published the Afghanistan Civilian Casualty Prevention Handbook. This document specifically addresses civilian casualty incidents in Afghanistan and focuses on their avoidance.

6.4 Appropriate, Rapid Responses to Incidents

The Board and Subcommittee received information from multiple sources confirming the critical nature of preventing and appropriately responding to civilian casualty incidents. Ms. Sarah Holewinski, executive director, the Center for Civilians in Conflict, provided testimony on this point before the Board at a public meeting on November 7, 2012. Ms. Holewinski noted that U.S. response to civilian casualties has improved dramatically since 2001. Specifically, Ms. Holewinski provided information indicating that "the U.S. has become more adept at responding to alleged and known incidents of civilian harm . . . these practices represent positive changes for the better, though none are perfect and none have been institutionalized as standing U.S. policy following the wars in Iraq and Afghanistan." Thus, the Center for Civilians in Conflict advised that U.S. defense officials adopt the following "standing policy" regarding civilian casualties:

> Plan for and implement robust tracking and reporting mechanisms in any new conflict to ensure that data on civilian harm from the field is being captured in useful ways, including with regard to conflicts where there are few boots on the ground;
>
> Ensure a group of military personnel is consistently designated, prepared, and trained to fully investigate every alleged incident of civilian harm to ensure the U.S. is appropriately managing cases, including sending potential incidents of wrongful acts through the appropriate channels; these personnel should be deployed in every conflict from the start;
>
> Plan for and implement a civilian casualty tracking mechanism with adequate understanding of the local culture and civilian casualties methodology, tasked with gathering and synthesizing data from the field on a continuous basis, tracking cases of civilian casualties, both incidental and wrongful (including Special Operations Forces), and analyzing data to identify key trends for lessons learned;

> Plan for and implement a consequence management procedure for every conflict, including those without boots on the ground, with military personnel who understand the local culture, can work with the tracking mechanism to identify cases of civilian harm, develop appropriate responses, educate troops on those responses, and offer amends to civilians suffering losses with the understanding that there are real and lasting consequences to ignoring or overlooking such harm.[69]

In both Iraq and Afghanistan compensation for survivors or victims could be drawn from the Commander's Emergency Relief Funds or solatia monies.[70] Ms. Daphne Eviatar, of Human Rights First, provided similar testimony to the Board emphasizing the importance of providing a system of accountability that is understood by the local populace who must live with the outcome. Commanders who have spoken with the Subcommittee echo Ms. Holewinski's and Ms. Eviatar's observations: early engagement with the population is critical. BGen Kennedy explained that the local Afghan brigade commander lived next door to him when he commanded his regiment in Helmand, and was the best way to get word back to the affected population in the aftermath of incidents. Early expressions of regret and solatia payments appear to have an outsized beneficial impact on local communities and leaders, and often lead to greater cooperation both with respect to the incident and in future interactions. Commanders also consistently remarked on the importance of paying compensation to victims and the positive effect on victims and local leaders, disproportionately favorable to the cost.

The Subcommittee concludes that doctrine should continue to provide for holistic consequence management to civilian casualty incidents that may include compensation to victims in a manner that is culturally appropriate.[71] Furthermore, training should reinforce the value of doing so. The Subcommittee

[69] Letter from Sarah Holewinski, Executive Director, Center for Civilians in Conflict, to DLPB, 7 November 2012.
[70] Solatia payments are recompense made for mental suffering, or financial or other loss. "Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands." 32 CFR 536.145.
[71] Methods of regaining honor or providing compensation, such as Solatia payments, are not culturally universal. What is important in joint planning and should be codified is the need to understand the culture and make attempts to emphatically make amends for the loss of civilian lives.

also concludes that common, streamlined civilian casualty reporting requirements, coupled with the ability to apply further rapid assessment, are critical in helping commanders respond effectively to such incidents and preclude or lessen adverse mission impacts. They are also essential to discern potential unethical, improper, or illegal behavior on the battlefield. U.S. military units and investigative agencies have, over the course of years of operations in Iraq and Afghanistan, developed reporting, assessment, and response procedures to better respond to incidents of civilian casualty and overcome the asymmetrical adverse impacts of civilian casualties. These lessons learned are excellent and must be formally incorporated into enduring doctrine, tactics, and procedures, to be consistent across commands and available for future missions.

The Subcommittee also concludes that documenting all cases of civilian casualties in the COIN or low-intensity environment allows commanders to explain actions taken by their forces, dispel false claims or accusations, correct operational or procedural shortcomings, provide effective prompt restitution to survivors and support to victims, provide transparency at all stages, address misconduct, and conduct effective, uninterrupted operations. Common, streamlined reporting requirements should apply to all civilian casualty incidents whether or not they may constitute reportable LOAC incidents.

7.0 Investigations

"The greatest challenge with any of these cases is the location where they occur. Often it is in contested battle space where we don't have access to the crime scene or to potential witnesses."

- Mr. Mark Ridley
Deputy Director, NCIS
DLPB Meeting, 15 February 2013

7.1 Introduction

Regardless of the motivations or accuracy of those who report U.S.-inflicted civilian casualties, it is essential to determine quickly and accurately the facts in each case and inform command, local authorities and populations, the American public and the media. If a command prescribed preliminary inquiry suggests that U.S. forces may have improperly caused death or injury, or it appears the local population or leadership believes this to be the case, a full administrative investigation or referral to the relevant MCIO, as appropriate, should follow.

When initial inquiry and assessment indicate a matter may be significant, formal investigations must collect and preserve evidence, including witness accounts. They must provide the information and evidence necessary to take individual and institutional corrective measures when appropriate. Whether they take the form of formal administrative investigations or criminal investigations depends on whether criminal conduct is indicated and the purpose of the investigation. While simultaneous administrative and criminal investigations were common in the Army, this did not appear to be the case across the Services. Accomplishing both simultaneously is often appropriate, and can avoid unnecessary delays in final dispositions.

Experiences in Iraq and Afghanistan demonstrate that a timely, thorough, impartial investigation should occur in the direct aftermath of a civilian casualty event, or it could have a significant adverse impact on the subsequent handling

of a case. Mishandling or delay of a case during its investigatory stages can sometimes prove disastrous during the prosecutorial stage. When not conducted in a timely fashion by competent investigators, an investigation could result in evidence being lost, overlooked, or tampered with in such a way that it can preclude appropriate command action.

The evidence and testimony considered by the Subcommittee made clear that commanders must be able to conduct uninterrupted combat operations to the greatest extent possible, in spite of civilian casualties occurring in their operational environment. Investigations can interfere with mission imperatives when they divert resources from the fight. To address this, the Subcommittee recommends that administrative investigations of civilian casualty incidents be conducted by teams from echelons above the unit involved in the incident, or by teams from outside the unit's immediate area of operations, at the discretion of the senior commander (O-6 or above) responsible for operations in the region or as directed by higher command authority. The complexity of some cases and the need for specialized expertise may require this in any event. Commanders and investigators indicated that because of the potential catastrophic negative influence civilian casualty incidents may have on mission, such capability must be on call, ready on a moment's notice.

Even if the assets are available to investigate, there is always the challenge of establishing a permissive environment that allows the assets into the area to investigate. Commanders and MCIO leads commented on the difficulty and uncertainty of being able to secure a crime scene in a combat area for the time required to conduct forensic investigations in the first instance, or to return to incident areas at a later time should additional investigation be required.[72] Cultural and social norms relating to exhuming bodies have also been enormous challenges in civilian casualty cases in Iraq and Afghanistan.[73]

[72] Many commanders noted the cultural difficulties with the host-nations' tendency to "clean" the incident scene quickly and the rapid burial of bodies in accordance with religious beliefs.
[73] MG David Quantock, USA, Brig Gen Kevin Jacobsen, USAF, Mr. Mark Ridley, NCIS, DLPB Public Meeting, 15 February 2013, Transcript, at 18.

As noted, incidents can be investigated administratively using assets responsive to the commander or, if the incident appears to have criminal aspects, by MCIOs. Each of the MCIOs exercises a high degree of independence regarding what cases they investigate and the methodology they employ.[74] While commanders generally cannot require an MCIO to initiate, modify or terminate an investigation, MCIOs do take commander requests into careful consideration. Commanders appearing before the Subcommittee and Board consistently commented on the responsiveness of MCIOs to their needs.

Nonetheless, commanders may elect to conduct an administrative investigation simultaneously with an MCIOs' criminal investigation, usually in pursuit of different objectives. The Subcommittee learned of cases where command-directed administrative investigations were conducted in tandem with MCIO investigations because commanders needed to determine whether – regardless of potential criminal liability – leaders and other personnel involved were fit to continue in their positions, or whether changes were required to operational procedures. Both commanders and MCIO witnesses observed that when simultaneous command and MCIO investigations were underway it was critical to maintain close liaison between the two to avoid unintended adverse impacts on either, but all considered such in-tandem investigations feasible.

In a deployed environment, the initial report of an incident is frequently inaccurate in some form or fashion. What may first seem like a legitimate combat activity may later turn out to be questionable. Likewise, what may initially appear to be a violation of the law of armed conflict or otherwise constitute misconduct may upon greater review, be justified and legal.

BG Volesky provided the Subcommittee with two examples of how first reports are not always accurate or self-evident and why thorough investigations are critical. He described an incident that occurred in Afghanistan in which

[74] Id. at 5-110. In particular, See page 105-106 in which Mr. Ridley testifies that NCIS evolved into a civilian lead criminal investigative organization as the result of the Tailhook cases and the investigation into the U.S.S. IOWA where timely notification did not occur and the issues were not investigated with impartiality. As a result, the Navy moved to a civilian director reporting directly to the Secretary of the Navy as opposed to an imbedded command structure beneath.

Coalition forces legitimately and legally targeted an improvised explosive device ("IED") emplacer who committed a hostile act. The IED emplacer was engaged, neutralized, and the operation was complete. Shortly after the incident, a local official told Coalition forces in the area that a civilian had been injured during the engagement. An initial review of the operations that day indicated that the coalition forces were not on the block where the civilian was injured – he was four blocks away – making the allegation improbable. In the immediate aftermath of the report, the command was skeptical that Coalition forces caused an injury four blocks away. Not satisfied with the initial review, BG Volesky directed further investigation. Upon further review and walking the area, it was discovered that the round which impacted the IED had ricocheted four blocks to injure a non-combatant. It was only by digging deeper that the unit arrived at the true facts.

BG Volesky described another occasion when his forces engaged another IED emplacer with an aviation asset. Shortly after the engagement, a local official reported that a child had been killed in the strike. Again, the unit rejected the notion that they had killed the child because the IED emplacer was in an isolated area far away from town and they had assessed the potential for collateral damage before the engagement to be zero. They also watched as the target was engaged and believed they had hit the target directly. Again, upon further review, the command found that the IED emplacer had been engaged 45 seconds after the command had been given to engage. In that same 45 seconds, a child had ridden her bicycle into the blast radius of the munition and was killed. The unit had not been aware of the change in circumstances from decision to execution. In the aftermath of the investigation, the unit modified its procedures to minimize the possibility that such an event would be repeated. In both cases, the unit also provided the families immediate financial compensation for their losses.

Juxtapose these examples with the lessons learned in the Haditha cases. In those cases, delayed reporting and investigation led to a host of complications, and made criminal charges hard to prove.[75]

Regardless of the type of investigation conducted, the commander must have the ability quickly to determine the facts and deal with the effect of the incident on the local community. In both cases outlined above, a criminal investigation was not needed, and an administrative investigation allowed the command to address systemic issues that led to the civilian casualties and take corrective action to mitigate future similar occurrences. As such, the Subcommittee recommends that at the GCMCA's discretion, command assessments and criminal investigations can and should be performed concurrently, as is commonly the practice in the Army.

7.2 Criminal Investigations

> **"[A] combat environment strains the limits of any justice system. This environment is often subject to the fog of war, contested terrain and time distance factors that may lead to a degraded ability to gather and collect evidence."[76]**
>
> **- Major General Vaughn Ary, USMC**
> **DLPB Meeting, 22 January 2013**

Gen Mattis told the Board that "there is a demonstrated need for capable investigators in combat zones who can respond rapidly and thoroughly to allegations of violations of the UCMJ and the Law of Armed conflict."[77]

The MCIOs are the U.S. Army Criminal Investigation Command ("CID"), the Naval Criminal Investigative Service ("NCIS"), and the U.S. Air Force Office of Special Investigations ("AFOSI").[78] Military law enforcement officials have

[75] See Appendix V
[76] MajGen Vaughn Ary, USMC, DLPB Public Meeting, 22 January 2013, Transcript, at 243.
[77] Letter from Chairman of the Joint Chiefs of Staff, GEN Martin Dempsey, to DLPB, Gen Mattis enclosure, 3 January 2013.
[78] DoDI 5505.03, Initiation of Investigations by Defense Criminal Investigative Organizations (Mar. 24, 2011). They are also called Defense Criminal Investigative Organizations, together with the Defense Criminal Investigative Service. This report refers to them as MCIOs.

authority to apprehend Service members for violations of the UCMJ[79] and arrest certain others who are subject to the Military Extraterritorial Jurisdiction Act ("MEJA").[80]

For decades, military criminal investigators have conducted investigations into deaths of non-combatants during contingency operations.[81] Commanders may request investigations, but the MCIOs, which answer directly either to the Secretary or Inspector General of each Service, retain discretion to open investigations, and may initiate on their own even without a command request.[82] Commanders cannot independently delay or stop an investigation; only a Military Department Secretary can.[83] MCIO investigations have primacy over collateral investigations conducted by commanders, and those investigations cannot interfere or hinder the criminal investigation.[84] This stove-piped structure is designed to foster independence and objectivity. It insulates investigative findings against charges of undue command influence. At the same time, it arguably limits the ability of the commanders to harmonize investigations and set priorities among investigations that may affect their mission.

According to CID, the practice of requesting criminal investigative support to overseas contingency operations began in Somalia when the Senior Mission Commander recognized the need for law enforcement capability, especially in a country without a functioning government, and where civilian deaths could adversely impact the mission.[85] As a result, CID investigated non-combat deaths ranging from traffic accidents to mass murder. This practice continued during operations in the Balkans and Kosovo and into the latest operations in

[79] 10 USC, § 807 (Article 7, UCMJ), authorizes commissioned, warrant, noncommissioned, and petty officers to apprehend service members and also other persons authorized by regulation. The U.S. Coast Guard Investigative Service also has broad law enforcement authority over service members and others. 14 USC, Section 95.
[80] 18 USC, § 3261. 18 USC, § 3262 authorizes the Secretary of Defense to designate persons serving in law enforcement positions in DoD to arrest persons under the Act, and he has done so in DoD Instruction 5525.11. Defense law enforcement officials can also apply for search warrants. 28 CFR § 60.3.
[81] USACIDC information paper, "SUBJECT: Investigation of Non-combatant Deaths," dated 28 September 2012, Mr. Guy Surian, Deputy CID G2/3.
[82] DoDI 5505.03, para. 4.a., Encl 2, para. 1.a.
[83] Id., Encl. 2, paras. 1.b., 2.a.
[84] Id., para. 4.b.
[85] Id.

Afghanistan and Iraq. Policies for each operation are constantly updated to take into account the operation itself as well as the conditions in the country where CID is operating.

Several witnesses told the Subcommittee that criminal investigative resources in the combat zone have been a scarce commodity, but others and the MCIO leaders suggest that MCIO assets overall were sufficient to support the areas of operations.[86] Witnesses agreed that force caps inhibited the ability to flow military investigative assets into the areas of operations.[87] Campaign planning must make adequate investigative support a high priority. Further, in the case of a significant event, such as a LOAC violation or significant civilian casualty cases, special investigative or prosecuting teams could be deployed in a status exempt from ongoing force caps.

During the conflicts in both Iraq and Afghanistan, substantial amounts of forensic evidence were sent back the United States for laboratory analysis – a process that takes months to accomplish. There was no indication that civilian combat incidents, and particularly civilian casualty incidents, had priority in those continental U.S. ("CONUS") laboratories. There were MCIO expeditionary forensic teams in the areas of operations, but MG Quantock explained that these supported combat operations (e.g., forensics of improvised explosive devices).

[86] Mr. Mark Ridley, NCIS, DLPB Public Meeting, 15 February 2013, Transcript, at 90, Mr. Ridley stated "We're satisfied with resources that are in country. And if we didn't have enough, we would make the leadership decision to place additional personnel down range." Brig Kevin Jacobsen, USAF, DLPB Public Meeting, 15 February 2013, Transcript, at 89, Brig Gen Jacobsen stated "…It's worked out fine for us. We never had a situation where we were in need of additional resources and didn't have them…but source for counter intelligence [and] force protection." MG David Quantock, USA, DPLB Public Meeting, 15 February 2013, Transcript at 89, stated "… we meet requirements…"

[87] Force caps prevent the placement of military investigative and military justice assets in theater. Under a force cap system, at certain points in the operational planning process, planners are forced to decide between allocating combat arms personnel and support personnel to a certain designed limit of personnel in theater at any given time. During the 22 January 2013 Public DLPB meeting, LTG Chipman posited, "if you add another judge advocate, what are you taking away?... in Afghanistan we've had a fairly significant force cap for much of the time we've conducted operations…So, it's a prioritization with the commander of that 68,000 person level… How many lawyers do you want accompanying your forces? And so, it's really if you add another lawyer, are you going to take away an ammunition planner? And it's really that sort of discussion." At the 15 February 2013 DLPB Public meeting, Mr. Ridley from NCIS informed the Board that civilians do not count against force cap. Because NCIS consists largely of civilian personnel, Subcommittee member Chiarelli noted at the 15 February 2013 DLPB Public meeting, "it's much easier to use NCIS [when investigative resources are needed in theater]. . . the force cap is the real ugly thing here because it forces commanders [who may not have access to NCIS assets] to make decisions. . . [Commanders] don't have enough [investigative and military justice assets] to do the level of detail that I know this board wants to have done, but that's a trade-off that has to be made with the force cap."

These were not certified for criminal investigations, nor were they sufficiently robust. The lack of an accredited criminal forensic laboratory in theater is a concern of both MCIO leaders and commanders. NCIS Deputy Director Ridley explained that return of evidence for analysis by the CID Criminal Investigation Laboratory in CONUS "can cause significant delay due to shipping time and lab workloads."[88] The Subcommittee recommends that DoD doctrine and operational planning provide for a certified forensics capability close to the area of operations to better support criminal investigations, particularly those involving civilian casualties.

Some commanders expressed frustration over not controlling criminal investigative assets and the speed at which they operated. Decisions made by commanders on disposition of allegations often depend on receipt of that information. In this regard, commanders seek the results of forensic efforts as quickly as possible. While sufficient MCIO independence is needed to insure the integrity of investigations and the autonomy of MCIO supervisors and commanders, in a joint operating environment the relationships between investigators and operational commanders need to be clear and not-Service dependent.

7.3 Administrative Investigations

As previously outlined in the reporting section, in a COIN or low-intensity conflict, the GCMCA should always receive notice of civilian casualties and require a preliminary inquiry into cases of death or serious injury to civilians. Upon receipt of the results of the preliminary inquiry, the commander can then determine if an administrative investigation is necessary and the appropriate command level at which to investigate.[89] While each of the Services prescribes

[88] Mr. Mark Ridley, NCIS, DLPB Public Meeting, 15 February 2013, Transcript, at 60. Mr. Ridley supported the recommendation to improve forensic capability forward.

[89] An administrative investigation (JAGMAN, AR 15-6, Commander-Directed Investigation) is a data-gathering tool for the commander and is usually directed by an officer or a board of officers to ascertain facts and make findings and recommendations. These investigations can be performed for a number of situations or incidents, including those involving property and personnel. These are separate and different from criminal investigations, but MCIOs and commanders may use information collected in these for military justice purposes.

different procedures, these investigations have a number of common features. An investigating officer ("IO") is appointed to gather and consider all the relevant facts about an incident, possible misconduct, or a failure to adhere to regulations or policies by personnel under the appointing authority. The IO must be thorough and impartial, and consider all sides of the issues.

Most of the commanders who appeared before the Board and Subcommittee emphasized the desirability of detailing IO's from outside the unit involved in the incident, and no lower than battalion. Some stated that an IO from a neighboring battalion suffices. As a battalion commander in Ramadi, BGen Kennedy related that an outside lieutenant colonel would typically investigate incidents in his area of operations. While he did not appreciate another Lieutenant Colonel in his area of operations, he sees wisdom in the practice from his perspective today. Others state the IO should be detailed from the brigade or regimental level, or higher. One best practice related to the subcommittee by LtGen Mills is to designate a senior officer – an O-5 or O-6 – and detail the officer in the tactical operations center to assess incident reporting and to serve as the IO whenever an incident requires investigation. LtGen Mills stated that having an objective outsider, someone additional to the G-3 staff, looking at operational reports coming through the operations center was invaluable. This officer also served as the command appointed investigator and reported directly to the GCMCA. The initial assessment team can also serve a critical role in being the bridge between the preliminary inquiry and investigation.

Like the preliminary inquiry, the administrative investigation should be focused on fact-finding. As a battalion S-3 and Executive Officer in the early days of Operation Iraqi Freedom, COL David Hill recalled that investigations into potential combat misconduct were viewed as witch hunts; five years later as a battalion commander, investigations were seen by soldiers as routine, effective, and often the means by which soldiers were cleared. MG Cucolo, whose Iraq service overlapped COL Hill's agreed, "Investigations became an understood part of the landscape." He explained, "Part of understanding and developing

organizational climate is the understanding that an investigation, and a 15-6, might be the best way to air out and hold for the record, the facts of what occurred. So it's a positive thing for you, because what happened in your behavior is captured in writing for a later date should it be called into question."[90]

In administrative investigations, the appointing authority establishes the purpose and scope of the investigation and the nature of the findings and recommendations required. The findings may be used as the basis for an adverse administrative action,[91] and provide evidence that supports criminal prosecutions. The IO submits a written report to the appointing authority containing findings and recommendations. Findings of fact must be supported by a preponderance of the evidence.[92] The appointing authority is not bound by the IO's findings or recommendations.

A commander may also look to his Service Inspector General to inquire into, and periodically report on, the discipline, efficiency, economy, morale, training and readiness throughout the command or relating to a particular incident. While there is some crossover at times, the Service Inspector General does not generally handle criminal investigations.

It is essential to collect and preserve evidence in both administrative investigations and criminal cases. Investigations and courts-martial can be prolonged processes. All apparently relevant evidence must be collected and preserved in a manner that assures its integrity, availability at a later time, and proof that it was not altered while in custody. Given the logistical challenges of battlefield investigations and the frequent rotations of personnel, this can be challenging.

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[90] BG Anthony Cucolo, USA, DLPB Public Meeting, 15 February 2013, Transcript, at 143.

[91] If adverse action is contemplated, the appointing authority must provide the subject individual with the following safeguards prior to final action: 1) notice of the proposed adverse action; 2) a copy of the part of the findings, recommendations, and supporting evidence on which the proposed adverse action is based; and 3) a reasonable opportunity to reply in writing.

[92] See, e.g., AR 15-6, para. 3-10.b. ("findings…must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion"). The JAGMAN, Art. 0207a(2) is more succinct ("preponderance…i.e., more likely than not").

7.4 Interface Between Investigators and Prosecution

Although generally notified of the allegations and briefed as to status, the attorney responsible for prosecutions is often not involved with the substantive investigation or prioritization of effort, and may only see the investigation report in its final form. Investigators, in turn, often have no role after the investigation is complete. This division of labor can be inefficient, and more structured cooperation between judge advocates and investigators may improve the quality and speed of the investigation and the prosecution.

Many if not most cases involving civilian casualties require both administrative and criminal investigations. These investigations should be performed concurrently with criminal investigations, separating them only serves to unnecessarily delay final disposition. That said, commanders and criminal investigators must ensure they de-conflict and coordinate simultaneous investigations. The Subcommittee recommends that as part of the Joint Planning-Process, the joint commander consider formalizing a cooperative agreement between the command and investigative agencies requiring coordination when criminal investigations are initiated. The agreement should require continued early initial liaison and coordination through case disposition.

7.5 Record Maintenance and Accessibility

Investigations cannot be fully useful to commanders unless practical means exist to record them in a central repository and search and analyze them after the passage of time. For a variety of reasons, there is very often a need to re-examine incidents that were previously investigated and documented. It is important to maintain a centralized, searchable repository of civilian-casualty investigations, to address questions that may arise at a later time by the public, partners, host nation or media.

While it is true that some high-profile investigations are documented and kept on hand, CID has determined that no central searchable repository or

system of records exists to ensure investigations are maintained. This is consistent with the results of the Subcommittee's attempts to locate records to analyze past events. Review of cases indicates that allegations may arise long after the underlying incidents and inability to locate records can frustrate the ability to prove the allegations unfounded, or to ensure accountability for misconduct. No trend analysis and little reliable systemic analysis can be conducted under these circumstances. Commanders and judge advocate leaders agreed that it is essential to create a centralized, searchable, digital repository for all civilian casualty investigations or inquiries, regardless of type or component and that said repository be maintained no lower than combatant command levels.

As such, DoD should create an administrative investigation central repository for GCMCA command directed investigations concerning civilian casualties and other investigations concerning civilian casualties it deems necessary to retain.

7.6 Increase in Powers to Obtain Evidence

Physical evidence in cases arising in the deployed environment may be compromised or lacking entirely. As a result electronic communications of Service members can become critical to achieving a successful prosecution. The current mechanism for the military Services to obtain electronic communications as evidence from civilian contractors and other civilian sources in criminal investigations is inefficient and overly burdensome. For example, a military investigator cannot conduct a search of a civilian (i.e. Yahoo!) email account – the contents of which are stored on the server of the email provider – because the email account does not reside within the scope of the military's jurisdiction. As a result, even when the investigator has sufficient probable cause to believe an email account contains evidence of an offense, he or she must seek authority through a civilian prosecuting authority from a civilian judicial officer. Several practitioners and staff judge advocates voiced concerns that the "best evidence" was often not available for examination during an investigation

due to the requirements to this required coordination through a civilian prosecuting authority. Criminal investigators also echoed this sentiment. Equally cumbersome is the process of having to use the DoD Inspector General to obtain other forms of records.

A suggested recommendation intended to assist commanders in securing necessary evidence is to enhance the power of military Services to effectuate search warrants of private company servers and databases to allow DoD investigators better access to electronic communications and other electronic records of civilian sources. At this time, though, the Subcommittee does not believe there is sufficient information for it to propose a particular solution. However, the Subcommittee does recommend further review as to how search warrant authority can be acquired to permit the military Services to quickly and efficiently obtain electronic communications and records without lengthy Department of Justice involvement.

7.7 Speed and Oversight of Investigations

Ensuring efficient, expeditious processing of civilian casualty-related military justice cases is critical to good order and discipline and command credibility. Consequently, operational commanders must maintain visibility over the status and progress of each civilian casualty case. In prescribing how military justice will be administered in the area of operations, the joint force commander should prescribe guidelines for subordinate commanders and MCIOs to report the progress of investigations and prosecutions, and hold them accountable for adhering to them. MCIOs should regularly report progress.

Three timing points have particular relevance for operational commanders: the date of discovery of the alleged offense; completion of the investigation; and date of final command action on the case. Despite the MCIOs' best efforts, the hazards and complexities of the combat environments slowed responses and prevented access to some locations, resulting in loss of potential witness and forensic evidence. These losses were exacerbated by cultural norms such as

the care of remains. Operational commanders must make support of MCIO investigators a priority.

Resources are always challenging during deployed operations; however, both investigative and military justice resources are mobile and can be augmented. As has often been done in high-profile cases involving component resources, assets have been made available by the Services to support investigations, prosecutions and defense consistent with the importance of the case. That said, pooling resources in a joint-deployed environment leverages investigative capabilities.

Cases involving civilian casualties often require expertise sparsely distributed throughout the joint operational environment or resident in CONUS. To maximize the efficiency, streamline the process, and expedite how commanders address such sensitive incidents - a commander should control the appropriate resources to immediately and competently investigate these incidents.

Nevertheless, the differences between the Services regarding authority over MCIOs and the relative independence of the MCIOs are confusing. While such independence is needed to insure the integrity of investigations and the autonomy of MCIO supervisors and commanders, in a joint operating environment these relationships need to be clear and not-Service dependent. MCIOs must be responsive to the investigative needs of the joint force commander, without derogating the existing authority of the Military Department Secretaries. Experience suggests that one MCIO or another has taken the de facto lead within areas of responsibility.

To plan for any contingency, joint doctrine and planning guidance should address MCIO support that provides timely and effective investigation processes to sensitive and high profile incidents such as civilian casualties in the current or anticipated operational environment. Joint doctrine should establish a process to insure that appropriate MCIO expert investigative capabilities, regardless of

Service, can respond immediately to augment assets in the area of operations to cases involving potentially criminal civilian deaths or injuries. This joint doctrine and guidance should clearly address MCIOs' activities in operational areas and incorporate clear, common directions regarding the relationships between commanders and MCIOs, common generic terms or descriptors of what is required or expected of commanders and MCIOs, and clear guidance regarding coordination of their respective activities Lastly, joint doctrine should also clarify that the joint force commander may prescribe guidelines for subordinate commanders to report the progress of investigations and prosecutions.

8.0 Case Resolution Processes

"And while I certainly sympathize, and I try to mitigate the buildup of stresses on the Marines, and I understand why perhaps they go astray, you cannot forgive those lapses. And the same rules have to apply. When the blood's drained out of everybody you've got to apply the rule of law. And it kind of disheartens me for people then to provide excuses for Marines that are clearly guilty of capital offenses. Just because that they were in a combat zone, you're not forgiven for that. . . So I know the American people want us to be sympathetic to our Marines and soldiers, but you cannot give them carte blanche to just do whatever, wherever their passions take them."

- Brigadier General Paul Kennedy, USMC
DLPB Meeting, 15 February 2013

8.1 Introduction

Military justice is designed to be fully deployable. The UCMJ contemplates the expeditionary nature of Service members and specifically provides the necessary authorities for commanders to deal with crimes committed by Service members in the deployed environment. In a deployed environment, the basic tenets of the military justice system remain intact, including significant constitutional and procedural rights for accused individuals.[93] The fundamental rights of the accused are particularly critical on the complex COIN battlefields that demand so much of Service members' individual judgment in complex and difficult circumstances.

Since the initiation of Operation Enduring Freedom in 2001, the Services have demonstrated increasing proficiency in the administration of military justice in the deployed environment. Between 2001 and 2011, the Army conducted over 800 courts-martial in the deployed environment.[94] During that same time, the Navy and Marine Corps conducted eight courts-martial in Afghanistan and 34 in

[93] Rule for Courts-Martial ("R.C.M.") 307, "Preferral of Charges" and R.C.M. 601, "Referral of Charges."
[94] Response provided by U.S. Army 17 December 2012.

Iraq. The Air Force conducted ten courts-martial in Iraq and three in Afghanistan.[95] When the circumstances of individual cases warranted, commanders have removed cases from theater into garrison.

The commanders who addressed the Board and Subcommittee, who have commanded from the battalion to division level and above, testified that the UCMJ afforded them the processes they needed to preserve discipline in their units while also treating Service members fairly. Additionally, each Service, and the Chairman of the Joint Chiefs of Staff, has provided views that the UCMJ is working in the deployed environment and that it adequately affords Service members sufficient rights. Gen Mattis, Commander, USCENTCOM, observed, "in light of the extraordinary demands placed on Service members in combat, the UCMJ appropriately affords Service members greater and wider reaching rights and procedural protections than the civilian criminal justice system." He added, "because the UCMJ provides a robust framework for both discipline and accountability of Service members and command for all areas related to personal and unit performance, it provides far reaching access to commanders and advocates for the prosecution to pursue justice from a holistic approach." Commanders and the Services agreed that the existing UCMJ process allows commanders to reach appropriate resolutions.

8.2 Role of the Convening Authority

> **"In a combat environment, noncompliance with rules and undisciplined operations cost lives and negatively impacts the mission. Even culturally insensitive actions can escalate the level of violence for our combat forces, serve to further alienate the local civilian populace and lead to strategic setbacks to our national interests. For these reasons, the commander must maintain the central and preeminent role in our military justice system."**
>
> **- Major General Vaughn Ary, USMC**
> **DLPB Meeting, 22 January 2013**

[95] Response provided by U.S. Air Force and Navy on 17 December 12.

The American military justice system is command-centric. The military justice system is an essential tool to preserve good order and discipline. This need is greater in a deployed environment than in garrison because a breakdown in good order and discipline can severely affect the mission. The ability to deal swiftly, fairly, locally, competently, and visibly with all misconduct, both in and out of the field environment, both major and minor, is necessary to achieve effective deterrence and discipline. MG Cucolo testified that while good order and discipline ideally results "because of a desire to do the right thing," military justice is "absolutely indispensable" to maintaining it.[96] In explaining his reliance on the UCMJ to enforce discipline and the connection between enforcing standards and mission execution, BGen Kennedy testified, "our rule was, how you lived inside the base usually dictated what your actions were outside of the base, and when you're interacting with Iraqis or Afghans and you become insensitive to following the rules, you tend to devalue those interactions and treat them…I mean it's a slippery slope."[97]

Executing fair, prompt military justice reinforces command responsibility, authority, and accountability, particularly in an era when "military justice is tweeted."[98] The military justice system provides commanders myriad tools to consider the nature of offenses and the harm created thereby, and apply the correct tools at the appropriate level.

The effective administration of military justice requires fairness to the accused and consideration for victims. This is particularly true with respect to convening authorities who determine what cases should be referred to courts-martial, who sits on court-martial panels, and who will take final action on cases after reviewing the records of trial and considering clemency and other matters submitted by the accused.

The Subcommittee has been profoundly impressed by the resolute commitment to justice demonstrated in the testimony of all of the current and

[96] MG Anthony Cucolo, USA, DLPB Public Meeting, 15 February 2013, Transcript, at 161.
[97] BGen Paul Kennedy, DLPB Public Meeting, 15 February 2013, Transcript, at 217.
[98] MG Anthony Cucolo, USA, DLPB Public Meeting, 15 February 2013, Transcript, at 153.

former commanders who testified before us, from colonel to lieutenant general. Their nuanced understanding of the quasi-judicial functions convening authorities must exercise was echoed in our deliberations by the former commanders on the Subcommittee, LtGen John Sattler and GEN Peter Chiarelli. They demonstrated a sophisticated and sensitive understanding of victims' interests and rights, as well as those of the accused, and a commitment to fairness balanced against the evidence adduced in cases before them.

Based on observations in the course of the Subcommittee's work, as well as personal experience and knowledge, the majority of the Subcommittee endorse the central role of commanders in American military justice and consider the role of commanders as convening authorities to be indispensable to a fair and effective system of justice for armed forces. This majority believes this is particularly so for U.S. forces that are regularly called upon to respond to dangerous and protracted contingencies around the globe, for missions ranging from peace keeping to major conflict, in every organizational construct from small Special Operations units to large formations.[99]

8.3 Trying Cases Forward

The Services have adopted different philosophies regarding where courts-martial should be tried, and that was reflected in testimony to the Subcommittee. Army commanders were unanimous in their preference for conducting trials forward, which reflected a regular practice in areas of operations controlled by Army commanders who numerically predominated in both Iraq and Afghanistan. MG Quantock testified:

> It goes back to speed and accountability….from an investigative standpoint, you've got it all there. You've got the witnesses, you got the victims, you got the whole case…. [B]y pushing it back to the States, everybody goes in 4,000 different directions and trying to pull that thing back together …takes a long time, and meanwhile, you have an issue that happened in theater, you'd like to solve it, and the people that see this case see something either happening

[99] See Appendix VI for Board Member Fidell's opinion on this point.

> or not happening to the person accused. This has a huge impact on the rest of the organization…[100]

BGen Kennedy thought that offenses should ideally be tried in theater because it is the best deterrent. "Flash to bang matters."[101] On the other hand, LtGen Mills did not try any serious cases in Afghanistan and said he would have been very uncomfortable doing so because of ongoing combat operations and lack of prosecution assets, among other factors. As a CONUS GCMCA, he did not feel disadvantaged by cases being removed from the theater where the events occurred and transferred to his CONUS jurisdiction. Regardless of philosophy, with few exceptions, joint force commanders typically acceded to the Services' determination. Judge advocates who appeared before the Subcommittee were split on the issue.

Witnesses suggested that trial forward can have a number of advantages. If prosecution can proceed quickly, trial participants, including multiple accused and both military and civilian witnesses, may be obtained with greater ease than for a trial in CONUS. Both the trial itself and final disposition are visible to the host nation and the local community that was affected, as well as to the affected military units. A single convening authority can potentially dispose of the entire matter. The organization in which the incident occurred arguably has greater motivation to manage the case efficiently and effectively than a CONUS command far removed from the incident and the area of operations. For these reasons, a majority of the Subcommittee agrees that trials should be tried forward if practicable. That said, the benefits of trying cases forward must be balanced against a variety of other factors that may favor trial outside of the area of operations. Consequently, the Subcommittee recommends that a preference for trials forward, when practicable, should be included in joint and Service doctrine.

[100] MG David Quantock, USA, DLPB Public Meeting, 15 February 2013, Transcript, at 199-200.
[101] This colloquial phrase relates to the flash of an artillery piece when a round leaves the barrel of the cannon and the bang when it explodes. Used in this way, it refers to timeliness and visibility of actions.

In practice, the complexity of the command structure and transient nature of personnel and the operational environment significantly affected whether cases were tried in theater or moved to CONUS. As LtGen Mills explained, in-theater prosecution can be a distraction from combat operations, combat operations may make logistics support unavailable, and prosecution resources may be inadequate. Unit rotations and modularity have had a profound impact, resulting in units serving under commanders from other organizations, with all of them on different rotation schedules. Thus, a convening authority might rotate before a case was ready for trial, and accused and witnesses might remain in theater, rotate back to the convening authority's location, or rotate to different locations. Furthermore, those involved could be from different Services. Affecting all of this was the length of time required to develop cases and may become the determining factor. Particular cases posed some or all of these challenges.

In Haditha, the Marine solution was to appoint a Consolidated Disposition Authority in CONUS to act in all of the cases that arose from the incident. A trial forward may be undesirable depending on political relations with the host nation; retention of the accused in the area of operations may become an irritant and could result in host nation demands to transfer custody. While civilian counsel, experts, and family member witnesses have been able to travel to the areas of operations, access to the area of operations is unquestionably more difficult than if the prosecution proceeds in CONUS. When cases or accused return to CONUS, the Subcommittee recommends that doctrine should include the use of a Consolidated Disposition Authority to exercise convening authority over geographically dispersed accused.

8.4 Transfer of Convening Authority Functions

One inhibition to retaining cases in the area of operations is the failure of the MCM to allow a convening authority to transfer a case to another convening authority after referral of charges if the other convening authority is not a

successor in command.[102] This is problematic in the deployed environment. A deployed GCMCA may redeploy after referral, but before the trial or final action occurs. Because of the way we employ units and rotate personnel, the GCMCA may be left in the precarious position of either retaining convening authority responsibility, despite being at great distance from the trial and no longer exercising command in that area of operations - or be precluded from moving the case back to garrison unless charges are withdrawn to allow a replacement GCMCA to act on the case.[103] Should the redeployed GCMCA elect to withdraw charges, the new GCMCA will need to complete referral a second time. If motions or the trial have already occurred, these would also need to be re-accomplished, adding substantial length to the process.

To avoid this inefficiency, the Subcommittee recommends amendment of the MCM to authorize transfer of convening authority functions after referral to any other convening authority who may adopt that court-martial as the convening authority's own. This authority will allow the successor convening authority to exercise full authority over the case, without having to effectuate referral or potentially a new trial.

8.5 Increasing the Ability to Try Multiple Accused Together

Civilian casualty cases in Iraq and Afghanistan have involved multiple perpetrators and in all of these cases, each perpetrator was tried separately. We perceive that separate, sequential trials have unnecessarily burdened units whose members and other resources were diverted from duties to testify multiple times. For cases tried in theater, this can include diverting Service members from active operations to travel through often hostile environments. The burden can be great with respect to foreign national civilian witnesses. The challenge of

[102] R.C.M. 601(b) provides that any convening authority may refer charges to a court martial convened by that convening authority or a predecessor. Predecessor is construed to mean a predecessor in command, in the same position. See MAJ E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*. ARMY LAWYER, Jan. 2012 (commenting on the desirability of transferring cases to replacement convening authorities when the initial convening authority rotates).

[103] R.C.M. 604(a) allows a convening authority to withdraw charges for any reason and R.C.M. 604(b) allows referral to another court-martial, but R.C.M. 604 is constrained by R.C.M. 601 in relation to actions by different convening authorities.

obtaining the repeated appearance of civilian witnesses can be even greater because obtaining the cooperation of local witnesses is difficult in the best of circumstances, and often requires onerous travel and similar risk in the operational environment. Logistical challenges to bring foreign nationals to CONUS for cases are extraordinary.

While trial strategy and tactics may have informed decisions to try accused separately, we perceive that a significant, if not predominate reason, is an MCM bias against trying multiple accused in the same court-martial, perhaps in conjunction with a lack of experience with such trials among judge advocates.

While the MCM allows for a single "joint" trial for multiple accused in cases where accused are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses," and that "related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial"[104] the rules and their discussion amount to a presumption in the MCM against joint or common trials. The existing guidance provides that an accused can move to sever "if it appears" that the accused will be prejudiced, and a motion for severance in a common trial "should be liberally considered" and granted upon good cause.[105] Severance is "ordinarily appropriate" when the moving party wishes to use the testimony of one or more co-accused or the spouse of a co-accused; a defense of a co-accused is antagonistic to the moving party; or

[104] R.C.M. 601(e)(3)

[105] R.C.M. 906(b)(9). The standard – prejudice – is the same that applies in the federal courts, but the injunction to liberally construe a motion to sever is unique to courts-martial. See R.C.M. 601(e)(3) discussion: "where different elections are made (and, when necessary, approved) as to court-martial composition a severance is necessary." R.C.M. 906(b)(9): "Severance of multiple accused, if it appears that an accused or the Government is prejudiced by a joint or common trial." R.C.M. 906(b)(9) Discussion: "A request for severance should be liberally considered in a common trial, and should be granted if good cause is shown." There is a subtle distinction between a common trial – in which multiple accused are tried for offenses committed at the same time and place, and provable by the same evidence, but where they did not act together with common intent , and a joint trial – in which multiple accused are tried for the same offenses committed together with a common intent. The 1951 and 1969 MCM's explain this distinction clearly but the 2012 MCM carries over the injunction to liberally construe motions to sever common trials without clarifying the distinction. Before the UCMJ, the rule was stated differently: the court should be more exacting in when the accused acted in concert. See, e.g., A Manual for Courts-Martial, U.S. Army, 1928, para. 71.b.

evidence as to any other accused will improperly prejudice the moving accused.[106]

An additional constraint on joint or common trials is the unique right of military accused to be tried by a court of officers if the accused is an officer, a court including enlisted members if an accused is an enlisted member, or for any accused to be tried by a military judge alone. The MCM further requires separate trials when different accused make different forum selections.[107]

The clear MCM preference against single trials for multiple accused, coupled with the liberal severance mandate, has limited the deployed commander's ability to administer military justice effectively and efficiently. These provisions are more generous to the accused than is constitutionally required. The Supreme Court has repeatedly reminded federal courts "[t]here is a preference in the federal system for joint trials of defendants who are indicted together."[108] As the Supreme Court explained, "Joint trials play a vital role in the criminal justice system. They promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."[109] Moreover, joint trials ensure against the government "presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience, and sometimes trauma, of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand."[110] Consistent with the Supreme Court's ruling, the rules in the federal system are to be "construed liberally" in favor of joinder.[111]

The arguments in favor of single trials for multiple accused apply strongly in cases arising out of the deployed environment. By giving commanders the

[106] R.C.M. 906(b)(9) Discussion.
[107] See R.C.M. 812 Discussion: "where different elections are made (and, when necessary, approved) as to court-martial composition a severance is necessary."
[108] Zafiro v. U.S., 506 U.S. 534, 536 (1993); U.S. v. Bordeaux, 84 F.3d 1544, 1547 (8th Cir. 1996).
[109] Zafiro, 506 U.S. at 537.
[110] Id.
[111] U.S. v. Sarkisian, 197 F.3d 966, 975 (9th Cir. 1999). See generally, U.S. v. Novaton, 271 F.3d 968, 988-89 (11th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002) ("Nevertheless, because of the well-settled principle that it is preferred that person who are charged together should be also tried together . . . the denial of a motion for severance will be reversed only for an abuse of discretion.").

option to try multiple accused at once, commanders are able to quickly try these cases and gain efficiencies of time and resources that would otherwise be drawn from the battlefield. Witnesses would only need to be available for one trial. This could be an incentive for trying cases forward. Furthermore, joint trials greatly reduce the burden on victims. Victims would only have to relive the offenses and face the inherent difficulties of testifying once, as opposed to multiple times should the accused be severed.

Several of the Services have expressed a reluctance to revise the military justice system to facilitate joint trials because of the differences that exist between civilian and military systems. Lt Gen Harding, noted that "while we can accommodate joint trials, they are often impracticable due to the accused's individual right of forum choice."[112] Mr. Mabus, The Secretary of the Navy, added "the unique aspects of command responsibilities and the lawfulness of orders commonly found in battlefield offenses mean many joint accused may have positions antagonistic to each other and varying degrees of criminal culpability for the same joint act."[113] Gen Mattis noted, "while certain judicial economies may exist by conducting joint trials, giving an accused to right to sever his trial from another allows his case to stand on his own without appellate level concerns about whether his due process rights were protected."[114]

The members of the defense bar who appeared before the Board were united in their opposition to revise the military justice system to facilitate joint trials. Mr. Dwight Sullivan noted the difficulty in convening joint trials as "you can't have a joint or a common trial if you have different forum selection."[115] He adds that while a convening authority has the right to convene a joint trial, "as a practical matter, the defense gets something of a veto by forum selection."[116] COL Peter Cullen expressed that joint trials are "rarely in the interests of an

[112] Letter from the Judge Advocate General, Lt Gen Richard Harding, on behalf of the Secretary of the Air Force, Mr. Michael Donley, to the DLPB, 20 December 2012.
[113] Mr. Mabus letter, supra note 39.
[114] Gen Mattis enclosure, supra note 77.
[115] Col Dwight Sullivan, USMCR, DLPB Public Meeting, 15 February 2013, Transcript, at 307-308.
[116] Id. at 308.

individual client"[117] and therefore you would "find defense counsel looking for ways to ensure that those cases were severed." Col John Baker added, "as someone who defends an individual client, I think it's rarely in that client's best interest."[118] He also argues that joint trials are inefficient as "a lot of our cases where you would want to do a joint or common trial involving Service members, involve Service members from different commands. And now you have, as people PCS and what not, you got witness problems, there are more logistical hurdles I think than the gain you're going to get."[119]

The concerns raised by the Services and defense bar are valid, but should be balanced against the interests of the government, victims and witnesses discussed above. In an environment of limited resources, joint trials will allow a convening authority to draw resources only once, as opposed to multiple times. These resources include court reporters, witness travel expenses, and the service of panel members.

Deployed commanders may refer cases involving joint accused to a single trial while also preserving the valuable due process rights afforded to each accused by the UCMJ – including, the right to forum selection (*e.g.*, trial by military judge alone, by officer members, or by a panel consisting of officer and enlisted members). When situations arise where multiple accused request different forum venues the convening authority could accommodate these requests in a single trial, but for the MCM proscription. For example, should one accused request trial by judge alone and one accused request trial by panel members, the convening authority could seat a panel to decide the case of the member requesting trial by military panel while the military judge decides the case of the Service member requesting trial by judge alone.

Joint trials may also benefit an accused. In cases involving multiple accused Service members, when tried separately, an accused may have incentive to be tried last. An accused tried last has the unequal benefit of

[117] COL Peter Cullen, USA, DLPB Public Meeting, 15 February 2013, Transcript, at 309.
[118] Col John Baker, USMC, DLPB Public Meeting, 15 February 2013, Transcript, at 309-310.
[119] Id. at 310.

hearing the government's case, having increased sworn testimony to impeach a witness or victim, and has an opportunity for witnesses to stop cooperating with the government or lose evidence. Joint trials could arguably provide each accused the same initial opportunity to attack the government's case. Joint trials may also encourage consistency in sentencing. If all the accused Service members are sentenced based on a single set of facts, there may be a higher likelihood of more consistent sentencing. The same fairness would arise if a single convening authority takes final action and determines clemency. There would also be one record of trial, easing the appellate process.

Furthermore, the advantages of joint trials to victims cannot be over-stated. A victim would only have to testify once at trial. Such practice will prevent repeat victimization, publicity, and inconvenience.[120] Additionally, victims and their communities often want swift justice. A joint trial may be tried more quickly than successive trials.

While recognizing that trial tactics and forum choices may prevent many joint trials, we recommend amending the MCM to strike the preference for liberal treatment of motions to sever and allow prosecutors the discretion to examine the facts and circumstances of individual cases to determine when and if a joint trial is desirable. Such factors must also include consideration of individual accused rights when co-accused elect different forums. We also recommend that senior judge advocate leaders review current training and policy with a view towards encouraging greater use of joint trials even under the existing MCM guidelines.

The Subcommittee commends the use of joint Article 32, UCMJ, pretrial investigations, which we understand, unlike joint trials, are not unusual. Rule for Court Martial ("R.C.M.") 405 allows alternatives to in-person testimony in Article

[120] Furthermore, minimizing additional victimization plays an important role in a COIN mission. As part of a COIN mission, the local population must feel that justice is served in a fair and respectful manner. Should the Armed Forces require someone who is a victim of a crime to repeatedly appear in court and face difficult cross-examination, the local population may begin to feel that the victim is on trial and that the justice attempted is neither fair or respectful.

32 investigations when a witness is not reasonably available. In so doing, it applies a balancing test between the significance of the evidence at issue and the difficulty, expense, delay, and effect on military operations. Further, R.C.M. 405 makes the determination by a commander that a witness is not reasonably available not subject to appeal, but subject to review by the military judge later. This greater latitude regarding alternatives to in-person testimony in Article 32 investigations has the result of being a force multiplier by not drawing Service members away from their immediate daytime mission to travel to a location to provide in person testimony. Additionally, there is arguably no diminution of existing individual Service member rights.

8.6 Allowing for Alternatives to Live Testimony at Trial

A primary exigency faced by convening authorities in deployed environments is witness availability. Active duty witnesses and victims redeploy out of combat zones and separate from the Armed Forces. Additionally, many active duty members who do not redeploy remain engaged in military operations that render their availability to participate in the court-martial process impossible or impractical. Beyond active duty witnesses and victims, in cases involving civilian casualties, many witnesses and victims are local nationals whose production and continued cooperation cannot always be assured. The pressure of ensuring that all relevant witnesses are available and physically in place to participate in deployed courts-martial could potentially strain the commanders' ability to preserve good order and discipline efficiently and effectively in their units. Additionally, in war-torn countries, the government faces the real risk of victims and witnesses disappearing or dying.

The UCMJ, as currently constructed, does not adequately provide flexibility in ensuring witness and victim participation. To facilitate witness and victim cooperation and participation, without seriously impacting the mission, commanders should have the option to use alternatives to live testimony.

The UCMJ allows for alternatives to live testimony through two means: depositions and video-teleconferencing ("VTC"). Regarding depositions, the UCMJ permits the convening authority, after preferral of charges, or, the military judge, after referral, to order a deposition when "due to exceptional circumstances of the case it is in the interest of justice" to preserve testimony for the Article 32 investigation or trial.[121] The government may introduce a witness' deposition in the findings portions of the court-martial so long as the military judge determines that the witness is unavailable to participate in the court-martial for a variety of reasons that include military necessity.[122] It should be noted that Article 32 testimony may, if properly obtained, qualify as a deposition for evidentiary purposes. Additionally, the judge may determine a witness is unavailable, and rather than introduce the deposition, may delay the trial until the witness becomes available.[123] Furthermore, depositions cannot be used over the objection of accused in capital cases,[124] which is a distinct possibility in cases involving civilian casualties. Lastly, to be a practical alternative, prosecutors must anticipate the need for depositions well before the court-martial.[125] They may need to coordinate with attorneys in the United States and ensure that accused have defense counsel present at deposition. Consequently, the Services must ensure that judge advocates, especially those who practice military justice in deployed environments, are well trained in coordinating and taking depositions, and even then unforeseen circumstances may preclude the use of depositions as a practical matter.

A more effective alternative to live testimony contemplated by the UCMJ is the use of VTC. The UCMJ currently permits VTC testimony for interlocutory and sentencing proceedings, even over the objection of accused.[126] In

[121] Art. 49, UCMJ; R.C.M. 702.
[122] Art. 49, UCMJ; R.C.M. 702; Discussion, MRE 804(a).
[123] MAJ Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat From 2001 to 2009*. ARMY LAWYER, Sept. 2010, p. 31.
[124] M.R.E. 804(b)(1)
[125] See Rosenblatt, supra note 123.
[126] R.C.M. 703(b)(1), "Over 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 differences outweigh the significance of the witness' personal appearance. Factors to be considered include, but are not limited to: the cost of producing the witnesses; the timing of the request for production of the witness; the potential

determinations of guilt or innocence, though, the government's ability to use VTC is limited as the military judge may only authorize such testimony "with the consent of both the accused and Government."[127] Therefore, the MCM-provided right of an accused to decline to consent to VTC can negate the utility of VTC testimony in courts-martial.

The increased ability to use VTC may be achieved by either amending RCM 703 or adding explicit authority to use VTC over the objection of an accused under Article 49, UCMJ. Amending the UCMJ to authorize the use of VTC testimony, and stating the circumstances when appropriate, provides a stronger legal foundation, as opposed to merely amending RCM 703. Therefore, to reduce the burden on commanders, operations, and witnesses, the UCMJ should be amended (rather than amending the MCM alone) to permit alternatives to live testimony at trial in cases arising in a combat environment when non-military witnesses refuse to provide in-person testimony, and when witnesses are not reasonably available.

While amending the UCMJ to allow VTC testimony is likely to face legal challenges, we expect that the government would succeed in such challenges. The Supreme Court considered the use of VTC testimony and established a two-part test to determine whether remote-means testimony is permitted: (1) "denial of confrontation is necessary to further an important public policy" and (2) "the reliability of the testimony is otherwise assured."[128] Advances in technology have helped assure the reliability of VTC testimony including ensuring that witnesses can be appropriately placed under oath, cross-examined, and have their

delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training; and, for child witnesses, the traumatic effect of providing in-court testimony." R.C.M. 1001(e)(1) "whether a witness should be produced to testify during presentence proceedings is a matter within the discretion of the military judge."

[127] R.C.M. 703(b)(1).

[128] Maryland v. Craig, 497 U.S. 836, 848 (1990).

demeanor observed by courtroom occupants; thereby satisfying the second prong of the Supreme Court test.[129]

The Armed Forces have a strong and compelling public policy interest to use alternatives to live testimony to prosecute offenses against civilians in the deployed environment. While the courts have not specifically determined that such a public policy interest warrants the use of VTC, a state supreme court has determined that a sufficient public policy reason exists that would justify the use of VTC when witnesses live beyond the subpoena power of the court and a witness' poor health made him unable to travel to the trial.[130] The Armed Forces face similar obstacles in deployed courts-martial as civilian witnesses are often outside the subpoena reach of the military courts and other witnesses are unavailable to travel due to military necessity. These inherent difficulties, coupled with the importance of preserving good order and discipline in a deployed unit, as well as the need to provide a sense of justice to the local population, justify a sufficient public policy interest that should permit the use of VTC in cases arising out of the deployed environment.

Change to allow the use of VTC testimony during the findings portion of cases arising in combat environments, even over objection from accused, could be accomplished by Executive Order change to R.C.M. 703 or adding explicit authority to use VTC over the objection of an accused under Article 49, UCMJ. A majority of the Subcommittee believes that statutory change, followed by Executive implementing action, providing the weight of two branches of government, would place the change on the firmest legal footing.

8.7 Non-Judicial Punishment

The UCMJ provides a non-judicial punishment alternative to the court-martial process. The non-judicial punishment process prescribed by the UCMJ

[129] Id. at 849-51 (determining that reliability of remote testimony is assured when the remote witness can be placed under oath, cross-examined, and that the witness' demeanor may be observed).
[130] Harrell v. Florida, 709 So.2d 1364, 1369 (1998).

provides an effective disciplinary tool for commanders, while also affording accused Service members procedural rights.

Under Article 15 of the UCMJ, commanders may offer non-judicial punishment to Service members accused of misconduct.[131] In turn, Service members are provided the option to either accept punishment under Article 15 or refuse punishment under Article 15 and demand trial by courts-martial. The only exception to the Service members' right to refuse Article 15 process is the "vessel exception," which precludes a member, regardless of Service, from refusing Article 15 punishment if the member is attached to or embarked in a vessel.[132] Unless the vessel exception applies, Service members offered non-judicial punishment have the right to confer with counsel before making an election as to whether to accept the Article 15 process or demand trial by court-martial.[133]

Some observers advocate expanding the vessel exception to Service members serving in combat zones, restricting their ability to refuse non-judicial punishment when deployed.[134] Reasons for doing so may include difficulties consulting with counsel who may be physically remote from the Service member, and ensuring speedy punishment without the potential complication of a court-martial that could interfere with unit operations.

We are unaware of evidence that would suggest a propensity of Service members to decline punishment in the operational environment, and most commanders who provided testimony to the Board and Subcommittee were of the opinion that Service members should retain the right to refuse or were skeptical of the value or advisability of limiting Service member rights in this regard. Reasons for not further limiting a Service member's right to demand court-martial in lieu of non-judicial punishment include the belief that it is a good

[131] See UCMJ, Article 15, part V, Manual for Courts-Martial (2013).
[132] Id.
[133] See United States v. Booker, 5 M.J. 238, 243 (CMA 1977)(holding it to be mandatory that an individual to be disciplined be told of his right to confer with an independent counsel before making an election; a record of non-judicial punishment is otherwise inadmissible on sentencing at a later court-martial); United States v. Mack, 9 M.J. 300 (CMA 1980)(vessel exception vitiates the Booker right).
[134] Rosenblatt, supra note 123 at 31.

check on the system, particularly in a combat environment where the nature of the underlying conduct may be a matter of judgment under difficult circumstances. MG Cucolo noted that restricting the right to refuse could become a negative incentive to recruits, adversely impacting the all-volunteer force.

The Subcommittee concludes that no change should be made to an accused's right to demand court-martial in lieu of non-judicial punishment.

The Subcommittee also considered whether there should be greater uniformity in non-judicial punishment processes and standards, consistent with joint command concepts. Currently, a joint force commander is obliged to follow the regulations of the offender's Service in administering punishment, but "should normally" allow non-judicial punishment to be exercised by the Service component commander.[135] Moreover, the Services currently have different standards of proof for non-judicial punishment. The Army standard of proof is beyond a reasonable doubt, whereas the Navy establishes it as preponderance of the evidence. The Air Force does not articulate a specific standard of proof, but notes that commanders should recognize that a member is entitled to demand court-martial in which a proof-beyond a reasonable doubt standard would apply.

While the Subcommittee considered greater uniformity, it was unable to reach a consensus as to whether increased uniformity was appropriate and if so, what the proper standard should be. The Subcommittee, though, determines that greater uniformity in non-judicial processes and standards is an important issue that warrants further study. Consequently, we recommend further review whether to increase uniformity in standards and processes regarding non-judicial punishment.

[135] Joint Publication 1, Doctrine of the Armed Forces of the United States, at V-22 (2 May 2007).

8.8 Enabling the Commander in the Joint Operational Environment

Commanders who testified before the Subcommittee agreed that a Service member's immediate commander should have the initial responsibility to determine the appropriate disposition of alleged misconduct. They were also of the view that superior commanders, including joint commanders, should have the practical ability to determine when and if a different course was appropriate and whether the authority to handle a matter should be raised to a higher level, either as a matter of theater policy or for a specific case.

The Services are consistent in their position that initial and final disposition authority should reside with commanders, as is currently the case. Mr. McHugh notes, "any effort designed to dilute the discretion and authority of commanders when evaluating cases and disposition options is fundamentally inconsistent with the principles codified in the [UCMJ]."[136] Lt Gen Harding adds that the initial and final disposition authority should survive in its current form because "creating artificial distinctions between offenses should not supplant a commander's case-by-case evaluation of an alleged offense."[137] As Gen Mattis provides, "commanders in a combat environment are uniquely poised to evaluate the larger context of the facts surrounding an incident to determine the disposition of investigations that are merely remiss from the clearly criminal, and to make decisions on those facts." [138] He endorses the current system as it is; giving "every commander the opportunity to make an independent decision coupled with a senior commander's oversight," he relates, "strikes the right balance to ensure fair disposition of cases."[139]

That said, the commanders appearing before the Subcommittee and Board raised concerns about the practical ability of the joint force commander to discipline members of other Services and special operations forces within their battle space. Mr. McHugh also identified this issue, stating "the feasibility of

[136] Letter from the Secretary of the Army, Mr. John McHugh, to the DLPB, 14 December 2012.
[137] Lt Gen Harding letter, supra note 122.
[138] Gen Mattis enclosure, supra note 77.
[139] Id.

commanders of joint commands having primary jurisdiction over all military personnel, regardless of branch of Service, within that command is a subject worthy of review and discussion by the DLPB."[140] These statements relate to another question this Board has been tasked to answer, "In joint, deployed areas, should military justice be pursued within the joint force, utilizing joint resources, rather than having cases handled separately and within each component force?"[141]

Commanders testifying before the Board and Subcommittee observed that although they commanded a battlespace consisting of Service members from all Services and where special operations forces operated, others routinely exercised jurisdiction over these Service members, and from time to time redeployed their Service members currently subject to disciplinary action with little or no visibility to the commander responsible for the area of operations. This was the case even when Service members' behavior seriously affected the unit's mission. Each of these commanders stated that not having disciplinary control over all Service members within their battlespace adversely affected his ability to preserve good order and discipline and provide continuity of disposition of like offenses. They advocated a movement towards real joint military justice, with the battlespace GCMCAs being responsible for the discipline of all Service members within their battlespace, and empowered to determine how discipline will be administered within their respective areas of operations.

8.9 Establish Joint Force Commander Control of Military Justice Processes

The exercise of military justice authority by a joint force commander is challenging, especially in today's more complex and dynamic battlefield. Preserving good order and discipline is a responsibility of command and is of the utmost importance in a COIN mission. Doctrine and principles of unity of

[140] Mr. McHugh letter, supra note 136.
[141] See Appendix I.

command and command responsibility make the joint force commander ultimately responsible for the discipline of the joint force.

Joint commanders should have the flexibility to determine the appropriate procedural approach for individual cases and classes of cases within their area of operations. Doctrine for the armed forces, Joint Publication 1, states that the authority, direction, and control of the combatant commander with respect to the command of assigned forces (combatant command ("COCOM")) includes the responsibility to "[c]oordinate and approve those aspects of administration, support, and discipline necessary to carry out missions assigned to the command"[142] and "[e]stablish personnel policies to ensure proper and uniform standards of military conduct."[143] The geographic combatant commander is authorized to convene general courts-martial. The combatant commander and other commanders to whom courts-martial convening authority is delegated, exercise operational control ("OPCON") that includes "authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command" but "[i]t does not include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training," which "must be specifically delegated by the COCOM commander.[144] Discipline is instead included in administrative control (ADCON), which is considered to be incident to the Services' "statutory responsibilities for administration and support."[145]

Joint Publication 1 further provides that while Service Component Commanders are subject to the command authority of combatant commanders, Service Component Commanders are responsible through the chain of command extending to the Service Chief for internal administration and discipline.[146] The doctrine provides that Service component commanders normally communicate

[142] Differences in standards across the services during deployment can be a source of frustration and friction that can erode morale. Arguably, culture equities should always be closely considered by the joint commander in determining uniform and joint standards when it comes to discipline, investigations, and justice.
[143] Id. at V-18.
[144] Id.
[145] Id.
[146] Id.

directly with their Service Chief on Service-specific matters like administration, informing the combatant commander as the combatant commander directs.[147]

Subordinate joint force commanders are responsible for the discipline and administration of military personnel assigned to the joint organization, but such a commander "normally exercises administrative and disciplinary authority through the Service component [commanders] to the extent practicable."[148] While recognizing that rules and regulations implementing the UCMJ and MCM are mostly of single-Service origin, Joint Publication 1 states the joint force commander should publish uniform policies where appropriate.[149] "Matters that involve only one Service should be handled by the Service component [commander], subject to Service regulations," although matters involving more than one Service "may be handled" by the joint force commander.

Gen James N. Mattis, Commander, USCENTCOM noted in his written submission, "I am confident that keeping as much authority in the Service chains of responsibility is compatible with the goals and justice for the joint force. Each Service has its own culture and so long as accountability is maintained, we are best enabled in maintaining discipline by sustaining the Service chiefs' responsibility for the managerial integrity of the forces they provide to the joint force."[150] He added, "The UCMJ functions as intended…. I can detect no area where significant reform is necessary."[151] In response to the third question from the Secretary of Defense concerned pursuing military justice within the joint force, utilizing joint resources, rather than having cases handled separately and within each component Service, Gen Mattis replied, "No. I recognize combat environments do present challenges for joint force commanders… compounded by the non-permanent and dynamic aspects of those commands (task organized) whose composition may change frequently and dramatically over the course of a

[147] Id. The Service component commander otherwise "will communicate through the combatant command on those matters over which the CCDR (combatant commander) exercises COCOM." Id. How this guidance should apply in practice is unclear since COCOM includes coordination of administration and discipline, while ADCON includes discipline.
[148] Id. at V-20.
[149] Id. at V-21.
[150] Gen Mattis enclosure, supra note 77.
[151] Id.

campaign. This is not unusual and clear commander's guidance coupled with traditional Armed Services' support to joint commanders will suffice…. The results of investigations (joint or single Service as appropriate) should be assessed as they are now and accountability should remain with each of the separate Armed Services."[152] Additionally, the circumstances of a particular case may make it undesirable to select members from a Service whose training and experience make them completely unfamiliar with the tactics, techniques, and procedures.

In Iraq and Afghanistan, the administration of military justice has almost exclusively been Service-specific.[153] The joint special operations community in Afghanistan, however, has since 2011 streamlined the legal justice process, illuminating the potential for the rest of the joint community in ways to combine the capabilities of all the Services into a common system during deployment. Under the current construct that otherwise applies to most personnel, the Air Force retains jurisdiction over all Airmen, the Navy over all Sailors, the Marines over all Marines, and the Army over all Soldiers, including when these Service members serve in an operational environment commanded by a different Service commander. The Services have adequately resourced their responsible USCENTCOM GCMCAs for this mission—whereas, joint staffs at the COCOM level generally are not resourced to handle military justice, especially courts-martial cases.

The existing doctrine, custom, and lack of resources, can result in joint staffs relying upon Service assets to manage military justice cases, especially long-running complex courts-martial cases. Even then, some cases have been moved to CONUS-based convening authorities at their respective discretion, thereby allowing the joint commander to focus his or her effort and that of their force on the operational mission. This Service-divided military justice structure

[152] Id.
[153] In October 2011, General John R. Allen issued the General Court-Martial Convening Authorities and Jurisdiction in Afghanistan memorandum. Under this memorandum, the Joint Commanders of CJIATF-435, CSTC-A, CFSOCC-A, and TF-35 would have jurisdiction over all service members within the combined unit, regardless of their service affiliation. All other service members would fall under the GCMCA of their respective services, even if serving in a battlespace owned and operated by a different service commander.

exists although the joint force commander who is responsible for the joint operating environment, often a regional commander, is a GCMCA in his own right and could theoretically convene courts-martial against any Service member.

According to several commanders who testified before this Board, the Service-specific practice erodes the commander's ability to preserve good order and discipline within his or her operational environment. MG Cucolo told the Board:

> [I]f you give me responsibility for a piece of ground and a group of people, I would want UCMJ authority over the people who are operating on that piece of ground for which I'm responsible; the people that come in for an extended period of time and are assigned to me or attached to me, regardless of Service, regardless of uniform.[154]

Other commanders expressed the same view. By possessing this authority, BG Volesky argued that the battlespace commander is able to impose his command philosophy on subordinate units to ensure equity and uniformity in discipline, and preserve the good order and discipline necessary for a successful COIN operation. BGen Kennedy agreed: "if you do not have the authority to discipline the forces that have been assigned to you, then – not to sound overly dramatic – but you're inviting anarchy."[155] Reporting to an Army brigade in Ramadi, he related that he never questioned the brigade commander's authority over his Marines, and "I didn't see any daylight in the expectation and the cultural bias and anything that might have been different from Fort Leavenworth or Fort Riley to Camp Pendleton. We saw it the same. And it's a uniform code of military justice."

While a joint commander may have or can pull available resources to conduct a Service-specific case, doing so may at times unduly distract the commander from the fight by focusing a commander's limited time, resources, and efforts to support a court-martial, or draw needed resources away from the

[154] MG Anthony Cucolo, USA, DLPB Public Meeting, 15 February 2013, Transcript, at 163. MG Cucolo and MG Quantock told the Board that their view, in which BG Volesky joined, was representative of their peers' view.
[155] BGen Paul Kennedy, USMC, DLPB Public Meeting, 15 February 2013, Transcript, at 246.

warfighting effort, both from the commander's legal support team and from throughout his command to support the logistics of a courts-martial. Thus, the offense or circumstances surrounding the offense may be of such a nature that persuasive reasons exist for a Service component to handle the disposition of a case. For example, the circumstances of a particular case may make it undesirable to select members from a Service whose training and experience make them unfamiliar with the tactics, techniques, and procedures potentially at issue. The commander responsible for the operations, the joint force commander, is in the best position to determine when joint interests or Service interests should have ascendency.

When existing joint doctrine is followed, a joint task force commander who receives authority to exercise OPCON over subordinate units does not necessarily have the authority to exercise discipline over these units ("ADCON"), although the joint task force commander may be a GCMCA.[156] In later practice in Afghanistan, regional ground-owning joint force commanders, whose joint manning documents augment organic judge advocates with judge advocates from other Services, have been adequately resourced and the regional commanders have exercised disciplinary authority when deployment orders have specified attachment for that purpose.

We acknowledge that individual Services have unique respective cultures and ways of disposing of certain offenses. In certain scenarios, these distinctions may very well render the Service component commander or subordinate Service commander the appropriate convening authority. The decision, though, as to when the Service component commander is the proper convening authority, should rest with the commander responsible for the joint

[156] Joint Publication 1, at p. IV-12-IV-13. Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (8 Nov. 2010), is consistent with Joint Publication 1. While stating that "command" "includes responsibility for health, welfare, morale, and discipline of assigned personnel"(at p. 53), it includes within "administrative control" (ADCON), "discipline, and other matters not included in the operational missions of the subordinate or other organizations" (at p. 3), but excludes discipline from "operational control," providing "it [OPCON] does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training" (at p. 229). *See* Joint Publication 3, at II-4 (to same effect). While a GCMCA can legally exercise jurisdiction over any service member located anywhere, GCMCAs have limited the exercise of jurisdiction based on custom and the terms of deployment orders and other superior direction.

military operation. It is inconsistent with both the fundamental concepts of joint command and the underlying rationale of the U.S. military command-centric military justice process to have the convening authority determination made by someone other than the commander responsible for the joint military operation and the discipline and effectiveness of the fighting force accomplishing it.

Simply put, the commander responsible and accountable for the operations, the joint force commander, is in the best position to determine when joint interests or Service interests should have ascendency. Joint force commanders should set the terms for exercise of discipline within the area of operations for which he or she is responsible.

Preserving good order and discipline is a responsibility of command and of the utmost importance in a COIN mission. Unity of command and command responsibility principles make the joint force commander ultimately responsible for the discipline of the joint force. As such, the Subcommittee recommends considering a revision to Joint Publication 1 that would remove from current joint doctrine the default that Service component commanders shall exercise disciplinary authority and instead specify in joint doctrine that joint force commanders at all levels have disciplinary responsibility and that discipline is part of OPCON. Furthermore, during the joint-planning process, the joint force commander should determine and prescribe the military justice jurisdictional responsibility in the area of operations. This may include establishing area-based jurisdiction and what, if any, category of issues will be withheld at the joint force level. The joint force commander may or may not envision the regular exercise of convening authority by subordinate joint force commanders.

To facilitate the joint commander's ability to exercise military justice in his or her area of operation, deployment orders should prescribe at least concurrent joint command UCMJ authority with the Service component commander over forces over which OPCON passes or that are physically in the area of operations. Furthermore, the Subcommittee recommends that the DoD review the resourcing of joint staffs and joint task forces and how Service component commanders

support the joint force commander. Such a review should consider alternatives for supporting joint convening authorities, to include assignment or temporary attachment of personnel to the joint headquarters, and designation of a Service component to support the joint convening authority. Joint manning documents should also prescribe adequate legal staffs at select joint task forces exercising GCMCA, and deployment orders should specify that the joint force commander exercise at least concurrent joint command UCMJ authority with the Service Component Commander over forces that are OPCON to the joint force commander or physically present in his area of operations.

While the Subcommittee recognizes that the Services will process actions on courts-martial after a convening authority has taken final action on a case, including potential action by Service Secretaries, this is not inconsistent with aligning command authority over a case with a joint force commander.

8.10 Provide Resources to the Joint Force Commander

As joint force commanders exercise increased military justice responsibility, they must have the resources necessary for the task. The information considered by the Subcommittee demonstrates that the joint force commander's organic legal support may not ordinarily be sufficient for exercising military justice authority, and the distribution of legal resources in an area of operations should be reexamined.[157] Alternatives to increasing organic legal resources within joint headquarters include pooling of component legal resources existing within the joint command to provide the joint commander with the necessary support or designating a Service component to provide necessary legal resources for the joint command. A court-martial requires a military judge, trial counsel, defense counsel, a court-reporter, a bailiff, and if requested, panel members. Applicable law does not require these actors be from the same Service as the accused.

[157] Joint Publication 1, at V-20, recognizes the ability of the joint force commander to create entities to support him or her ("the JFC may establish joint agencies responsible directly to the JFC to advise or make recommendations on matters placed within their jurisdiction or, if necessary, to carry out the directives of a superior authority. A joint military police force is an example of such an agency").

Pooling resources has occurred on an ad hoc basis in joint theaters and elsewhere. In a review of courts-martial conducted in Iraq in 2010, MAJ Gregory noted that there were five joint courts-martial conducted in Iraq between 2010 and 2011.[158] In these cases, the Army provided trial counsel, court reporters, and prospective panel members in two cases in which the accused were Navy personnel.[159] Furthermore, MAJ Gregory noted that Air Force personnel served as trial counsel and Article 32 officers for cases in which the accused were Army personnel.[160] He also highlighted a case where Navy Central Command transferred jurisdiction of a Sailor to an Army GCMCA in Afghanistan, and the case itself was tried by an Army panel with Navy defense counsel, Army trial counsel, and an Army military judge.[161]

Some assert that Service members should be tried in their own systems because of Service-unique military justice cultures. Pooling resources does not prevent the detail of same-Service personnel to a court-martial. Even where multiple Services are represented in a case, Service cultural dissimilarities and their effects can be mitigated during the court-martial process. Both prosecution and defense have the opportunity to present evidence during findings and sentencing to educate the court-martial participants who are not of the same Service.

Trials staffed jointly could enhance public perception. A court-martial result that is not popular or understood in public perception has the potential consequence of undermining confidence in the military justice system. Having a "purple" court-martial may help avoid the perception that a Service specific trial was "taking care of their own." A non-Service specific trial participant may provide a fresh and independent set of eyes to the court-martial.

Regardless, the joint planning process must plan for joint military justice should a commander choose to exercise it. As leveraging assets is important in

[158] MAJ Gregory, supra note 102, at 9.
[159] Id.
[160] Id.
[161] Id.

a joint environment to optimize capability, Services should also consider methods of pooling military judges and defense counsel, or managing them across the Services because timely and effective military justice depends on their initial and continued availability. The Chief of the Army Trial Defense Service, COL Peter Cullen, testified that a joint defense organization in a theater has "great potential," and the Chief Defense Counsel of the Marine Corps, Col John Baker, did not disagree, provided that it did not evolve into a purple full-time defense organization.[162]

8.10.1 Address Reduced Judge Advocate Trial Experience Levels

The Subcommittee considered testimony that declining numbers of courts-martial together with an increasing reliance on administrative processes has reduced judge advocates' military justice experience. There is no substitute for experienced, confident, knowledgeable judge advocates applying military justice processes to expeditiously achieve appropriate command objectives while ensuring fairness for accused. Testimony suggested that reduced opportunities to practice military justice have resulted in a need to provide for military justice career tracks to allow selected judge advocates to gain experience in this area without adversely affecting their careers, thereby ensuring that well-qualified military justice advisers are available to commanders and accused alike. The Subcommittee commends such measures by the Judge Advocates General.

8.10.2 Provide Specialized External Trial Resources for Commands Dealing with Cases Arising in Combat Environments

The Subcommittee concludes that the Services should establish litigation resources to support the prosecution and defense of complex civilian casualty cases, or similar high profile cases. All the information considered by the Subcommittee and Board demonstrates that these cases are difficult, time consuming, and predictably draw significant resources from organic legal staffs.

[162] COL Peter Cullen, USA, and Col John Baker, USMC, DLPB Public Meeting, 15 February 2013, Transcript, at 364-365.

More importantly, they require specialized expertise to avoid errors and ensure fair, efficient litigation.

Additionally, review of civilian-casualty cases indicates that specialized trial advocacy and investigative training is needed for cases arising in a deployed environment involving civilian casualties, to include specific training for cases relying only on circumstantial evidence. These steps would afford the deployed commander with the expertise to administer military justice successfully in cases of civilian casualties. These cases often present unique evidentiary and logistical challenges that most prosecutors are unlikely to have encountered. Moreover, the inherent difficulty in conducting timely and comprehensive investigations in combat zones is that they do not always allow for exhaustive evidence to be obtained and exploited. Counsel litigating combat cases must be capable of prosecuting serious cases based on circumstantial evidence. When such counsel are unable to conduct a prosecution, they should be available as advisors to the assigned counsel.

Expertise in litigating cases arising in a combat zone is most effective if it is continuous for the duration of the trial. Commanders need continuity from trial counsel so that no matter how long a case takes, the commander continues to have the same level of expertise. The Army currently provides commanders that expertise by specifically detailing trial counsel in high profile cases through their completion. This provides case continuity and a higher level of expertise to the commander. It also provides incentive for the prosecutor to try the case expeditiously and avoids having to re-educate new trial counsel. We recommend the Services consider maintaining continuity of trial counsel assigned to cases involving civilian casualties, when possible, for the duration of cases, while ensuring this does not adversely affect the counsels' potential for professional development and promotion. Review of personnel policies as they relate to trial and defense counsel, and other court personnel, who may become involved in complex long-running cases appears warranted.

8.10.3 Enhance Victim/Witness Liaison Processes in Civilian Casualty Cases

While standards regarding care, support, and keeping individuals informed apply to victims and witnesses in any case regardless of location, it is apparent that the standards may be more honored by their breach than their observance in deployed environments. In civilian casualty cases, attention to victims and witnesses is particularly important, as is keeping local and host-nation leaders informed. The Subcommittee recommends developing DoD doctrine to care for, support, and inform victims and witnesses in cooperation with available Host Nation institutions in deployed environments, particularly local nationals in civilian casualty cases.

The military justice system must also avail itself to the family members of those Service members accused of misconduct. The Board heard testimony from an accused Service member's mother that when her son was accused of misconduct in the deployed environment, she was unable to receive any assistance or information about either his case or how the military justice system worked.[163] While informing an accused Service member's family about the military justice system is important, it must not infringe upon the Service member's rights to a confidential relationship with his or her attorney and his or her privacy interests. As such, the Subcommittee recommends the development of an informational leaflet or handout relating to the judicial process to provide to family members of those accused of crimes. This will better facilitate family members understanding of the court-martial process, while not placing the Service members rights at risk.

8.11 Pretrial Confinement

The authority to order a Service member into pretrial confinement is an essential tool in a deployed environment, especially in cases involving civilian casualties. A commander has the authority under the UCMJ to order a Service

[163] See Appendix VII

member into pretrial confinement under certain circumstances.[164] Removing the accused from the active operational environment eliminates a potential threat to the safety of both active duty members and the civilian population.

The Subcommittee heard from several commanders that pretrial confinement was difficult to use in Afghanistan and Iraq. The primary difficulty was geography. During the conflicts, the sole pretrial confinement facility is in Kuwait, far from the battlefields. To order pretrial confinement, a minimum of six escorting Service members are required to move an accused from the battlefield to the pretrial confinement facility in Kuwait, forcing commanders to lose Service members needed for operations for two weeks or more. Additionally, as cases proceed to trial, an accused requires escorts to transfer him or her for Article 32 investigations and for trial. This process not only drains resources, but also adds additional time to the process. Speaking about Afghanistan, MG Quantock told the Board that a pretrial confinement facility should have been in Afghanistan, rather than Kuwait, but attempting to do so implicates force caps.[165] The Subcommittee recommends that the deliberate planning process should consider establishing pretrial confinement facilities close to the area of operations.

8.12 The Article 32 Investigation Process

The Article 32 investigation process in the deployed environment mirrors the process in garrison. This Subcommittee and the Board considered whether the current Article 32 process is too cumbersome in the deployed environment.[166] Some argue that Article 32 investigations afford the accused too many rights and delay resolving the case.[167] They argue that the Article 32 process should be limited to assessing the charges and recommending a disposition to the convening authority and that they be eliminated in the deployed

[164] R.C.M. 305(d)(1)-(3).
[165] DLPB Public Meeting, 15 February 2013, Transcript, at pages 84-85. At the same time, MG Quantock noted that as of 2013, there were no prisoners at the Kuwait pretrial confinement facility.
[166] DLPB Public Meeting, 7 November 2012. Transcript, at pages 264-278.
[167] R.C.M 405(f)(1)-(12) provides extensive protections to the accused in an Article 32 investigation. These include the right to be represented by counsel, to present evidence, to cross-examine witnesses, to have witnesses produced, to require the government to provide evidence within its possession, and to receive a copy of the investigating officer's report if the charges are referred to court-martial.

environment [168] and be replaced with a preliminary hearing that would combine the summary nature of the federal court preliminary hearing with the grand jury's denial of the right of an accused to be present, represented, or to produce witnesses or evidence.

We found no support from the commanders or practitioners (both defense and prosecution) for changing the Article 32 process. The commanders agreed that Service members should not be afforded less rights in the deployed environment then in garrison, and that the Article 32 process functioned effectively in its current form.[169]

The Article 32 process is an essential and unique feature of the military justice system. It mirrors the preliminary hearing process in the civilian sector much more than the grand jury system to which it is often, and erroneously, compared. In the civilian preliminary hearing process, there is a system of divided powers, characterized by the executive arguing against a defendant before another branch of government. This division of power ensures an inherent check and balance built into the structure of the system, which safeguards a grand jury system where the defendant has little, if any, rights. In contrast, the military justice system is unitary in nature, with the executive presiding over and convening courts. The system needs a check and the Article 32 investigation affords an accused a public forum in which the charges brought forward are thoroughly investigated.

Beyond protecting the rights of an accused, the Article 32 investigation is an important tool for the deployed commander. Cases involving civilian casualties are inherently complicated and often high profile. They place the legitimacy of the deployed military justice system at issue in the eyes of the public. Each case poses a risk that charges could be referred to court-martial where the evidence is insufficient or that the charges may be dismissed when

[168] Id.
[169] MG Quantock and MG Cucolo observed that speed is important in the process, but both concluded that it is fast enough and works well in its current form. DLPB Public Meeting, 15 February 2013, Transcript, at 177-181.

there is sufficient evidence to refer the case. Where Article 32 investigations inform commanders that a court-martial is not necessary or advisable, valuable command resources can be saved, and the investigation provides a credible basis for a commander to not move forward with the case. The Article 32 investigation greatly assists both the government and defense counsel in assessing allegations and increases flexibility in administering military justice. The Subcommittee concludes that the right to a full Article 32 investigation should not be limited in the deployed environment.[170]

That said, the Subcommittee received indications that in practice Article 32 investigations may have become unnecessarily complex. The Article 32 investigations contemplated by the UCMJ and the MCM are not "mini-trials", have greatly relaxed rules of evidence, and permit alternatives to in-person testimony in many circumstances. The Article 32 Investigation Officer has considerable discretion to determine the scope and manner of the investigation. The Subcommittee recommends the Judge Advocates General consider enhanced training for Article 32 investigators and judge advocates representing the government and individual accused to address what is and is not required and helpful during an Article 32 investigation and the proper exercise of discretion by Article 32 investigating officers to limit such investigations.

8.13 Control Over Contractors in the Operational Environment

Contractor misconduct complicates deployed commanders' ability to preserve good order and discipline in the operational environment and may impair the effectiveness of COIN operations. The commanders who provided testimony were consistent in their belief that one of the more challenging issues they faced in the deployed environment was control of contractors. Several

[170] One issue that the Subcommittee discussed was whether the Article 32 investigating officer should be a judge advocate or other officer. The Subcommittee did not reach a conclusion on this issue. During a discussion on this issue at one Board public meeting, GEN Chiarelli referenced investigative efforts after Haditha: "in order to understand why we shot and why we didn't shoot, you got to have somebody down there to understand what it's like to have to make those decisions, and not all our lawyers have had to make those decisions, but I think it was absolutely critical that that individual ha[s] a bevy of lawyers that he could call on to give him recommendations and make sure he was straight." DLPB Public Meeting, 15 February 2013, Transcript, at 183.

commanders detailed instances when, unknown to them, contractors travelled through their battlespace, and allegedly committed criminal offenses or ROE violations, including civilian casualties, and then left the battlespace. The commanders were left to deal with the collateral consequences of the contractor's activity, primarily an angry and injured civilian local population. Commanders expressed to the Subcommittee that they had few disciplinary options with regards to contractor misconduct. In non-DoD contractor cases they lacked criminal jurisdiction over the contractors. In other cases, commanders stated that they were not aware of specific contract terms which might prompt contractor removal. Similar to the need to have disciplinary control over all Service members located in their area of operation, the commanders expressed the need to address contractor misconduct. This impacts the commanders ability to successfully accomplish the mission.

In addition to testimony of the commanders and MCIOs, in its 2011 report to Congress, the Commission on Wartime Contracting made specific findings regarding the use of Private Security Contractors in Iraq and Afghanistan. Amongst these findings was that:

> Serious public-opinion backlash in the local communities and governments can also occur after contractors are accused of crimes. Public opinion can be further inflamed because jurisdiction over contractors is ambiguous, legal accountability is uncertain, and a clear command-and-control structure is absent. A prime example of this risk becoming reality occurred in 2007 with the killing of 17 Iraqi civilians in Baghdad's Nisur Square by employees of the company then known as Blackwater. The armed security guards were under contract by State. Perceptions of improper or illegal behavior by contractors who suffer few or no consequences generate intense enmity and damage U.S. credibility.[171]

The evidence considered by the Subcommittee and presented in the Commission on Wartime Contracting report was persuasive that commanders do not have the ability to effectively control contractor misconduct, or sanction misconduct. Commanders must have control of their battlespace and the

[171] Commission on Wartime Contracting, *Transforming Wartime Contracting: Controlling Costs and Reducing Risks*. Final Report to Congress, August 2011, p. 30.

necessary tools to apply consistently both the rules of engagement and battlefield ethics.

Presently, commanders do not have sufficient authority to adequately handle alleged contractor misconduct relating to civilian casualties. Commanders have some authority over contractors who are serving with or accompanying an armed force in the field, but that authority is effectively withheld at SecDef level. The Subcommittee concludes that presently, commanders do not have adequate control over all contractors acting within their battlespace. The UCMJ provides jurisdiction over "persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands," subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law.[172] It also provides jurisdiction over "persons serving with or accompanying an armed forces in the field" in time of declared war or contingency operations.[173] These provisions provide some jurisdiction over contractors, but limit it to instances where contractors are serving with, employed by, or accompanying armed forces. Many contractors in today's battlespace may have an agreement with the United States to operate in the operational environment, but are not serving with, employed by, or accompanying the armed forces. These contractors currently fall outside of the purview of the military justice system. To the extent that they may come within the jurisdiction of DOJ under MEJA, jurisdiction is limited to felonies and its exercise can be cumbersome.[174] Accordingly, the Subcommittee recommends that Article 2, UCMJ, should be amended to allow for jurisdiction over all U.S. government contractors on the battlefield, regardless of U.S. government

[172] UCMJ, Article 2(a)(11).
[173] UCMJ, Article 2(a)(10).
[174] 18 U.S.C. §§ 3261-3267. DODI 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (Mar. 3, 2005) implements MEJA. Combatant commanders or their designees can order the temporary detention of somebody subject to MEJA, but the DoD General Counsel is responsible for initial coordination of cases for prosecution with the Domestic Security Section, Criminal Division, DoJ. The Combatant Commander supports those efforts through the Chairman, Joint Chiefs of Staff.

departmental affiliation.[175] Commanders may also exert additional control over contractors in the operational environment through contractual means. Contractors inherently operate in the deployed environment based upon an agreement with the United States. The commanders who appeared before this Subcommittee stated that they were either unaware of the terms of the contract or that the contract did not provide for prompt removal of contractors in the case of criminal misconduct. Additionally, they provided that they were often either unaware a contractor was operating in their battlespace or that a contractor was involved in an incident with a civilian.

To address these failures, the Subcommittee recommends that all contractors entering the battlespace should receive appropriate battlefield ethics training, as a term of their contract; that all contractors should be required to notify commanders of incidents and respond to CCIR's, especially when they are involved in civilian incidents that occur in a commander's battlespace, as a term of their contract, and that DoD should develop a mechanism to ensure that contracting officers inform commanders of contractor presence and contract terms and processes to respond to contractor misconduct.

8.14 Dereliction of Duty Pertaining to Civilian Casualties

The Haditha cases[176] serve not only as a reminder of the importance of reporting requirements, but also as an example that it is often a Service member's or commander's dereliction of duty that either results in civilian casualties or exacerbates their impact. In the Haditha cases, the squad leader ultimately pled guilty to negligent dereliction of duty. Similarly, the battalion commander failed to accurately and promptly report the events that transpired in Haditha, which the Government asserted he had a duty to do.[177] The

[175] We also observe that jurisdiction over former service members under Article 3, UCMJ, does not currently reach discharged members who may become contractors within an area of operations. Additionally, we are aware that should SecDef accept this recommendation, it would impact other federal agencies. Therefore, we concede that if this recommendation is approved, it would have to undergo inter-agency coordination prior to implementation.
[176] See Appendix V.
[177] Id.

Government alleged that not only did the battalion commander fail to report the events, but he also failed to investigate the allegations that his Marines were responsible for unlawfully killing civilians.[178] These allegations eventually led to the battalion commander's involuntary retirement.

The events that transpired in Haditha caused a public outcry that called into question the legitimacy of U.S. armed forces' actions in Iraq and negatively affected the COIN mission. Six years after the events, the squad leader pled guilty to negligent dereliction of duty and the battalion commander involuntarily retired without criminal sanction. While this body does not pass judgment on the outcome in the Haditha cases, the results did not serve to address public anger or provide a sense of justice to the local population. Haditha also provides a cautionary example that the underlying cause of civilian casualties, including deaths, may be a Service member's dereliction of duty. Consequently, the maximum punishment permitted for dereliction of duty must be appropriate for the serious consequences that a Service member's dereliction may have in the deployed environment.

Investigation and prosecution in the Haditha case and others also reflects the practical difficulty of holding commanders and supervisors accountable for the actions of subordinates, and failures to respond appropriately to them. The discussion above regarding the importance of establishing clear reporting and response requirements for civilian casualty cases has significant application here. If responsibilities to report and inquire into civilian casualties are not clear and unequivocal, it may be impossible to establish dereliction of duty.

Currently, the maximum punishment for negligent dereliction of duty consists of forfeiture of two-thirds pay per month for three months and confinement for three months.[179] For willful dereliction, the maximum punishment increases to a bad conduct discharge, forfeiture of all pay and

[178] Id.
[179] UCMJ, Art. 92; MCM, App. 12, Art. 92.

allowances, and confinement for six months.[180] These maximum punishments are not commensurate with the potential consequences of dereliction resulting in civilian casualties. Nor do they make alternative dispositions to court-martial a practical option because there is little incentive for an accused to accept these alternatives, such as a discharge for the good of the Service.

Even if such a case is successfully prosecuted the current maximum punishment may do little to effectively deter similar misconduct or provide a sense of justice to the local population. Accordingly, the Subcommittee recommends increasing the maximum punishment for dereliction of duty to ensure appropriate sanctions in civilian casualty cases.

8.15 Transparency Concerning the Disposition of Allegations

The Subcommittee considered information indicating a perception in deployed civilian environments, among some NGOs and U.S. citizens, that the U.S. military fails to hold commanders and other leaders accountable for their part in allowing or failing to prevent civilian casualties, and failing to report and adequately follow-up on allegations of civilian casualties. The perception of a lack of leader accountability may exist for many reasons. In some cases, leaders are held administratively accountable, which is sometimes not transparent to uninvolved parties. In other cases, administrative reviews revealed no dereliction. In addition, DoD guidelines do not address whether it is permissible to release information on administrative sanctions received by DoD personnel.[181] Consequently, differing standards among the Armed Services concerning the releasability of information about administrative sanctions inhibits and confuses communications. The Subcommittee recommends that DoD develop uniform guidelines for the release of information concerning administrative sanctions imposed on Service members, taking into account legitimate public interests in civilian casualty and other high interest cases. The Subcommittee also

[180] Id.
[181] Office of the Secretary of Defense, Withholding of Information that Personally Identifies DoD Personnel. 3 February 2005.

recommends that campaign planning address communications with NGOs in the area of operations.

8.16 Mandatory Life Sentence for Premeditated Murder

The UCMJ prescribes a mandatory minimum sentence of imprisonment for life with eligibility for parole for premeditated murder and for cases in which a death results from the act or omission of the accused who was at the time committing or attempting to commit a variety of offenses. [182] The only other mandatory punishment is death for spying.[183] This is an anomaly in a criminal justice system that provides maximum punishments and leaves to the trial forum discretion to tailor punishments to the particular circumstances and the particular accused in order to obtain a fair outcome.[184] Such discretion may be particularly apt in a combat environment where conditions, state of mind and mitigating circumstances can be legitimately at issue. Accordingly, the Subcommittee recommends review of whether to amend the UCMJ to eliminate the mandatory life sentence for premeditated murder and vest discretion in the court-martial to adjudge an appropriate sentence.

8.17 Defense Access to Witnesses

Although the MCM provides that the prosecution, defense, and court-martial shall have equal opportunity to obtain witnesses and evidence, an accused who desires the attendance of a witness at trial must request the witness from the trial counsel in the first instance and production can be refused if the trial counsel concludes it is not required under the rule.[185] When there is a disagreement, the matter can be submitted to the military judge, but reliance on

[182] See MCM, Part IV, ¶ 43. The MCM defines four forms of murder under Art, 118, 10 US.C. § 918: (1) premeditated murder, (2) killing when the accused intends to kill or inflict great bodily harm, (3) killing when the accused engages in an inherently dangerous act and evinces a wanton disregard of human life, or (4) killing when the accused was committing or attempting to commit burglary, sodomy, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery or aggravated arson.
[183] UCMJ, Art. 106, 10 U.S.C. § 906.
[184] In comparison, the federal system prescribes a mandatory minimum sentence of life without parole for premeditated murder.
[185] R.C.M. 703(c)(2)(D).

the trial counsel, initially, potentially requires disclosure of strategic aspects of the defense case to opposing counsel at a premature stage of preparation of the defense (to demonstrate that a witness on the merits is relevant and necessary). The Subcommittee recommends review of whether to amend the MCM so that the defense does not need to first request a trial witness from the trial counsel.

8.18 Appeal to the Supreme Court

A convicted accused can appeal directly to the Supreme Court by writ of certiorari if the case has first been reviewed by the Court of Appeals for the Armed Forces whose review is discretionary.[186] A decision by that court to deny review forecloses direct access to the Supreme Court. Other criminal defendants have the right of direct review. This includes defendants in military commission cases,[187] which places military accused in the anomalous position of having less rights than alleged enemies. The Subcommittee recommends review whether to amend the UCMJ or other statutes to permit an accused to appeal to the Supreme Court in cases in which the Court of Appeals for the Armed Forces denies a petition for review.

[186] UCMJ, Arts. 66, 67(a), 10 U.S.C. §§ 867, 867a; 28 U.S.C. § 1259. The ability to appeal to the Supreme Court was enacted as part of the Military Justice Act of 1983, Pub. L. No. 98-209, §10, 97 Stat. 1393 (1983). Accused can seek collateral review of courts-martial, principally through the writ of habeas corpus (28 U.S.C. § 2241) and suits for back pay (28 U.S.C. § 1491(a)(1). This provides an alternative route to Supreme Court review, but range of issues subject to collateral review and the scope of review are narrow and the course tortuous.
[187] 10 U.S.C. § 950g.

9.0 Conclusion

While the military justice processes have served the United States well, overall, regarding civilian casualty circumstances during the Iraq and Afghanistan wars, our experiences there have demonstrated areas of improvement over time, and significant areas that could yet be improved. The recommendations of this Subcommittee would strengthen commanders' ability wage effective, ethical warfare through a disciplined fighting force and, in particular, to respond to civilian casualty events.

Appendix I. DLPB Tasking Memorandum

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JUL 30 2012

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
CHAIR, DEFENSE LEGAL POLICY BOARD

SUBJECT: Military Justice in Combat Zones

The Uniform Code of Military Justice is one of the things that makes the U.S. military great. To ensure that our system of military justice remains fair, credible, and dependable in today's world, I believe we must, from time to time, assess whether certain reforms are warranted.

The application of military justice to Service members alleged to have committed offenses against civilians in combat zones is of particular concern to me. We know that, over the last 10 years in Iraq and Afghanistan, bad things have happened involving combat excesses and innocent civilians in deployed areas. The abuses have been rare among our professional fighting force, but they became huge flash points that threatened to undermine our entire mission and the foundation of our relationship with the host government and its people. Thus, for offenses that take place in a country in which we operate alongside the civilian population, it is critical that our system of military justice be efficient, fair, dependable, and credible. For now and for the future, we must get this right.

Therefore, I am today appointing the Honorable Judith Miller (the former General Counsel of the Department of Defense) and Major General (Ret) Walter Huffman (former Judge Advocate General of the Army) to co-chair a group of distinguished Americans to review and assess the following: military justice in cases of U.S. Service members alleged to have caused the death, injury, or abuse[1] of non-combatants in Iraq or Afghanistan. As military justice is not just a matter of law, but a commander's tool for good order and discipline, I am also appointing several retired commanders to this group, including retired Army General Pete Chiarelli and Marine Lieutenant General John Sattler. The review should encompass the period of time dating back to October 2001, the outset of Operation Enduring Freedom in Afghanistan. The review should not encompass allegations of detainee abuse or instances of collateral damage or "friendly fire" incident to a lawful military operation. Nor should the review pass judgment on the results of military justice in particular cases or intrude upon any pending case or investigation. The review should include, but not necessarily be limited to, an assessment of the following:

(1) The manner in which such alleged offenses are initially reported and investigated; are there ways to ensure that alleged offenses are reported and investigated promptly, thoroughly, and accurately? Are there ways to improve cooperation with local law enforcement and local communities?

(2) The command level at which the initial and final disposition authority now resides in such cases; is it at the right levels, or should the disposition authority be withheld to a different level?

[1]Also commonly referred to as "law of war violations," see DoD Directive 2311.01E.

(3) In joint, deployed areas, should military justice be pursued within the joint force, utilizing joint resources, rather than having cases handled separately and within each component service?

(4) In deployed areas, are resources adequate for the investigation of offenses and the administration of military justice?

(5) Should the system of military justice be revised in some manner to improve the way in which cases involving multiple defendants are handled? In cases involving multiple defendants, should the system be revised in some manner to better secure the testimony and cooperation of those involved in the offense? Are there lessons to be learned from the civilian system?

(6) Does the military justice system in deployed areas fully preserve the rights of the accused, while also respecting the rights and needs of victims and witnesses?

This group will be supported by civilian and military personnel within the Department, and it will function as a subcommittee of the newly-created Defense Legal Policy Board. I am directing that the Defense Legal Policy Board submit to me its own advice and recommendations, based on the subcommittee's report of its review and assessment, along with a copy of the subcommittee report, within 210 days. Prior to that date, the subcommittee's report should be submitted in draft form to the Military Departments for comment.

I direct that the Military Departments and all other DoD personnel cooperate fully in the group's review and make personnel and resources available upon reasonable request. All legally recognized privileges, such as the attorney-client or attorney work product privileges, should be preserved. The Department's General Counsel, Jeh Johnson, is available to provide additional information or guidance in connection with this review.

Thank you in advance for your cooperation in this important matter.

cc:
DepSecDef
USD(P)
USD(P&R)
USD(I)
ASD(LA)
ASD(PA)
DoD GC

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Appendix II. DLPB and Subcommittee Members

DEFENSE LEGAL POLICY BOARD

Board Members	Subcommittee Members
Judith Miller (Chair)	Judith Miller (Co-Chair)
John B. Bellinger, III	Walter B. Huffman (Co-Chair)
James B. Comey, Jr.	W. Kipling At Lee, Jr.
Daniel J. Dell'Orto	Peter W. Chiarelli
Carol Di Battiste	James B. Comey, Jr.
Eugene R. Fidell	Eugene R. Fidell
Jamie S. Gorelick	Charles J. Kovats, Jr.
Walter B. Huffman	Calvin M. Lederer
James E. McPherson	Roger L. Parrino
Roger L. Parrino	Richard D. Rosen
Michael E. Rich	John F. Sattler
Isaac N. Skelton, IV	
Jeffrey H. Smith	

Subcommittee Members' Biographies:

Ms. Judith A. Miller (Co-Chair)

Ms. Miller previously served as the general counsel for the Department of Defense. She also served as a partner at Williams & Connolly, LLP, an Assistant to the Secretary and Deputy Secretary of Defense, and as a law clerk to Associate Justice Potter Stewart, United States Supreme Court.

Major General Walter B. Huffman, USA, (Ret.) (Co-Chair)

Major General Huffman is Dean Emeritus and Professor of Law at the Texas Tech University School of Law. He previously served as Dean and W. Frank Newton Professor of Law at the Texas Tech University School of Law. Major General Huffman joined Texas Tech after serving as the senior assistant for law and policy to The U.S. Secretary of Veterans Affairs, and, prior to that position, as The Judge Advocate General of The Army.

Colonel W. Kipling At Lee Jr., USAF, (Ret.)

Colonel At Lee recently retired from the Senior Executive Service after serving fifteen years as the Deputy General Counsel, National Security and Military Affairs, Office of the Air Force General Counsel. Prior to joining the Senior Executive Service, Colonel At Lee served thirty years in the Air Force, including service as a Staff Judge Advocate.

General Peter W. Chiarelli, USA, (Ret.)

General Chiarelli currently serves as the Chief Executive Officer of One Mind for Research. He assumed this position after retiring from the Army after forty years of service. General Chiarelli served as the 32nd Vice Chief of Staff of the Army and as commander of Multi-National Corps-Iraq.

Mr. James B. Comey, Jr.

Mr. Comey is a Senior Research Scholar and Fellow on National Security Law at Columbia University and former Bridgewater and Lockheed Martin general counsels. He previously served as the Deputy Attorney General of the United States and as the United States Attorney, Southern District of New York.

Mr. Eugene R. Fidell

Mr. Fidell is a visiting lecturer at Yale Law School. He was a Coast Guard judge advocate from 1969 to 1972 and president of the National Institute of Military

Justice from 1991 to 2011. He is president of the Committee on Military Justice of the International Society for Military Law and the Law of War.

Mr. Charles J. Kovats, Jr.

Mr. Kovats is an Assistant United States Attorney, District of Minnesota, where he leads the District's Anti-Terrorism and National Security Team. He previously served as an Assistant United States Attorney in the Central District of California. Before joining the Department of Justice, Mr. Kovats was a Judge Advocate in the United States Army and is currently a member of the U.S. Army Reserves.

Colonel Calvin M. Lederer, USA, (Ret.)

Colonel Lederer serves as the Deputy Judge Advocate General of the Coast Guard. He entered the Senior Executive Service in 2002 after retiring from the United States Army Judge Advocate General's Corps with thirty years of service, including service as a Staff Judge Advocate and Commandant of The Judge Advocate General's School.

Mr. Roger Parrino

Mr. Parrino is currently a law enforcement professional consultant. He previously served as the Lieutenant Commander of Detectives, New York City Police Department, New York, New York. He also served as a corporal in the United States Marine Corps Reserve.

Colonel Richard D. Rosen, USA, (Ret.)

Colonel Rosen is a professor of law at Texas Tech School of Law where he serves as the director of the Texas Tech Center for Military Law and Policy. Colonel Rosen entered this position after retiring from the United States Army Judge Advocate General Corps where he served for twenty-six years, including service as a Staff Judge Advocate and Commandant of The Judge Advocate General's School.

Lieutenant General John Sattler, USCM, (Ret.)

Lieutenant General Sattler retired from the United States Marine Corps after more than thirty years of service. While on active duty status, Lieutenant General Sattler served as Commander, U.S. Marine Corps Forces Central Command.

Appendix III. Recommendations

Recommendations of the
Defense Legal Policy Board Subcommittee

These recommendations should be read in the context of the Subcommittee's full report. The Subcommittee recommends they be presented to the DoD General Counsel and SecDef to be integrated into DoD and joint policy, and when appropriate, reviewed by the Joint Service Committee on Military Justice to be uniformly implemented by the Services.

INCIDENT REPORTING

Reporting Process

1. The effective and efficient reporting, investigative, and response procedures concerning civilian casualties[188] used in Iraq and Afghanistan should be captured and integrated into joint doctrine and further implemented by Service regulations.

2. Deliberate planning for any campaign should include detailed joint guidance appropriate to the operating environment and area of operations for reporting through operational channels, investigation, and UCMJ/administrative disposition of alleged or discovered incidents of civilian casualties from military operations.

3. Whenever possible, especially in COIN operations, doctrine and deliberate planning should require notice of civilian casualties to senior operational commanders immediately or as soon as circumstances permit, in a manner prescribed by the senior joint force commander.

4. Notification of a civilian casualty should be made at least to the first General Court-Martial Convening Authority ("GCMCA") in the operational chain of command, and to the Geographic Combatant Commander.

[188] "Civilian casualty" is defined for the purpose of these recommendations as the death, serious injury or abuse of a local national civilian due to the action of U.S. or Coalition forces in a combat environment.

Training and Guidance

5. Continue to train and expand Battlefield ethics / lessons-learned training curriculum extrapolated from after action reports (*e.g.* civilian casualty reporting, LOAC, military ethos, command climate), during all levels of professional military education (PME), formal and informal schooling, exercises, and unit training.

6. Train ethical leadership to the lowest level in garrison and throughout deployments.

7. Reassess the DoD Law of War Program to ensure currency and consistency with best practices.

8. Campaign planning should address communications with NGOs in the area of operations.

INVESTIGATIONS

Preliminary Inquiry

9. Especially in COIN operations, or other suitable operational environments, and tactical considerations permitting, doctrine and deliberate planning should require commanders to conduct an uncomplicated, prompt, initial fact-finding inquiry, consistent with operational conditions, in civilian casualty cases to determine the readily available facts, likely cause, and extent of U.S. or coalition force involvement.

10. Initial inquiry into civilian casualty incidents should be followed by a determination as to the extent and type of additional investigation that may be needed.

11. If a command prescribed preliminary inquiry suggests that U.S. forces may have improperly caused death or injury, or it appears the local population or leadership believes this to be the case, a full administrative investigation or referral to the relevant Military Criminal Investigative Organization ("MCIO"), as appropriate, should follow.

Administrative Investigations

12. Administrative investigations of civilian casualty incidents should be conducted by teams from echelons above the unit involved in the incident, or by teams from outside the unit's immediate area of operations, at the discretion of the senior commander (O-6 or above) responsible for operations in the region or as directed by higher command authority.

13. The assessment of whether a civilian casualty incident is a possible LOAC violation reportable under the DoD Law of War Program should be a separate determination from the civilian casualty report and investigation requirement. Determination of LOAC reportable incidents should be made at the command level directed by the responsible GCMCA, but at no lower level than an O-6 commander with a judge advocate on his or her staff.

14. Timely disposition of investigatory matters is critical. At the GCMCA's discretion, command assessments and criminal investigations can and should be performed concurrently, as is commonly the practice in the Army.

15. Commanders and MCIOs should de-conflict and coordinate concurrent command assessments and criminal investigations. As part of the Joint Planning-Process, consider how criminal investigations will be coordinated.

16. The Incident Assessment Team concept should be included in future doctrine as a best practice.

17. DoD should create an administrative investigation central repository for GCMCA command directed investigations concerning civilian casualties and other investigations concerning civilian casualties it deems necessary to retain.

Criminal Investigations

18. Joint doctrine and planning guidance should address MCIO support that provides timely and effective investigation processes to sensitive and high profile incidents such as civilian casualties in the current or anticipated operational environment.

19. Joint doctrine should clarify that the joint force commander may prescribe guidelines for subordinate commanders to report the progress of investigations and prosecutions for civilian casualties.

20. Doctrine and operational planning should provide for a certified forensics capability close to the area of operations, to better support criminal investigations, particularly those involving civilian casualties.

21. Joint doctrine should establish a process to insure that appropriate MCIO expert investigative capabilities, regardless of Service, can respond immediately to augment assets in the area of operations to cases involving potentially criminal civilian deaths or injuries.

22. Review how search warrant authority can be acquired to permit the military Services to quickly and efficiently obtain electronic communications and records without lengthy Department of Justice involvement.

CASE RESOLUTION PROCESS

Disposition Authorities

23. Remove from current joint doctrine the default that disciplinary authority shall be exercised by Service component commanders and instead specify in joint doctrine that discipline is the responsibility of joint force commanders at all levels.

24. During the joint-planning process, the joint force commander should determine and prescribe the military justice jurisdictional responsibility in the area of operations. This may include establishing area-based jurisdiction and what, if any, category of issues will be withheld at the joint force level.

25. Deployment orders should prescribe at least concurrent Joint Command UCMJ authority with the Service component commander over forces over which OPCON passes or that are physically in the area of operations.

26. Review the resourcing of joint staffs and joint task forces and how Service component commanders support the joint force commander. Such a review should consider alternatives for supporting joint convening authorities, to include assignment or temporary attachment of personnel to the joint headquarters, and designation of a Service component to support the joint convening authority.

27. The MCM should be amended to authorize a convening authority to transfer convening authority functions to another convening authority's jurisdiction after a case has been referred to trial.

28. Include in doctrine, the use of a Consolidated Disposition Authority to exercise convening authority over geographically dispersed accused when cases or accused return to CONUS.

Legal Training and Support

29. Include in joint and Service doctrine and planning a preference for trials forward, when practicable.

30. As leveraging assets is important in a joint environment to optimize capability, Services should consider methods of pooling military judges and defense counsel, or managing them across the Services because timely

and effective military justice depends on their initial and continuing availability.

31. Establish litigation resources to support the prosecution and defense of complex civilian casualty cases, or similar high profile cases. In doing so, consider maintaining the continuity of counsel, when possible, for the duration of major cases while ensuring this does not adversely affect the counsels' potential for professional development and promotion.

32. Implement specialized trial advocacy and investigative training for judge advocates involved with civilian casualty cases arising in a deployed environment.

33. Review personnel policies as they relate to trial and defense counsel, and other court personnel, who may become involved in complex long-running cases to avoid adverse career impacts.

34. Senior judge advocate leaders should review current training and policy with a view towards encouraging greater use of joint trials, even under the existing MCM guidelines.

35. Consider enhanced training for Article 32 investigators and judge advocates representing the government and individual accused to address what is and is not required and helpful during an Article 32 investigation, and the proper exercise of discretion by Article 32 investigating officers to limit such investigations.

36. During the joint planning process, a determination should be made, based on the operational environment, as to when additional legal support will be needed to support battalion, or equivalent level deployed operations. To the extent possible, this assessment should be made early enough to allow the legal advisor to train with the unit scheduled to deploy. Further, the Services should be adequately resourced to ensure that judge advocates are available to support deployed operations without degrading other missions.

37. The deliberate planning process should consider establishing pretrial confinement facilities close to the area of operations.

UCMJ / MCM Changes

38. Amend the Manual for Courts-Martial ("MCM") to strike the preference for liberal treatment of motions to sever and allow prosecutors the discretion to examine the facts and circumstances of individual cases to determine when and if a joint trial is desirable. Such factors must also include

consideration of individual accused rights when co-accused elect different forums.

39. To reduce the burden on commanders, operations and witnesses, the UCMJ should be amended (rather than amending the MCM alone) to permit alternatives to live testimony at trial in cases arising in a combat environment when non-military witnesses refuse to provide in-person testimony, and when witnesses are not reasonably available.

40. The MCM should be amended to increase the maximum punishment for dereliction of duty to ensure appropriate sanctions in civilian casualty cases.

Contractors and the UCMJ

41. Article 2, UCMJ, should be amended to allow for jurisdiction over all U.S. government contractors on the battlefield, regardless of U.S. government departmental affiliation.

42. All contractors entering the operational environment should receive appropriate battlefield ethics training, as a term of their contract.

43. Contractors should be required to notify commanders of incidents and respond to Commander's Critical Information Requirements (CCIR), especially when they are involved in civilian incidents that occur in a commander's battlespace, as a term of their contract.

44. Develop a mechanism to ensure that contracting officers inform commanders of contractor presence and contract terms and processes to respond to contractor misconduct.

Non-Judicial Punishment

45. Review whether to increase uniformity in standards and processes regarding non-judicial punishment.

Victims, Witnesses and the Public

46. DoD doctrine should be developed to care for, support, and inform victims and witnesses in cooperation with available Host Nation institutions in deployed environments, particularly local nationals in civilian casualty cases.

47. Develop an informational leaflet or handout relating to the judicial process for family members of those accused of crimes.

48. The DoD should develop uniform guidelines for the release of information concerning administrative sanctions imposed on Service members.

OTHER ANCILLARY ISSUES FOR POSSIBLE SECRETARIAL REVIEW

49. Review whether to amend the UCMJ to eliminate the mandatory life sentence for premeditated murder and vest discretion in the court-martial to adjudge an appropriate sentence.

50. Review whether to amend the MCM so that the defense need not request a trial witness from the trial counsel in the first instance.

51. Review whether to amend the UCMJ or other statutes to permit an accused to appeal to the Supreme Court in cases in which the Court of Appeals for the Armed Forces denies a petition for review.

Sustained Best Practices

1. DoD should continue to meet with the International Committee of the Red Cross (ICRC) to solicit views and provide feedback about ICRC global initiatives.

2. Continue to invite the International ICRC to participate in LOAC training during pre-deployment mission rehearsal exercises.

3. MCIOs should continue to regularly report progress to the joint force commander, as well as within their respective Service channels.

4. Operational commanders should continue to make timely support of MCIO investigators a priority.

5. Continue paying compensation to victims in the deployed environment (*e.g.*, Solatia, Commanders Emergency Response Fund, etc.) quickly in accordance with existing doctrine.

6. Convening authorities should, as appropriate, continue to conduct combined Article 32, UCMJ investigations for several accused Service members when their underlying misconduct arises from the same series of events.

7. The requirement for a preliminary inquiry in every civilian casualty incident involving death or serious injury.

8. Continue the use of the Incident Assessment Team concept as a bridge from preliminary inquiry to investigation.

Appendix IV. Glossary

GLOSSARY OF ABREVIATIONS AND ACRONYMS

A.

- ADCON — Administrative Control
- ADM — Admiral (Navy)
- AFI — Air Force Instruction
- AFOSI — U.S. Air Force Office of Special Investigations
- AOR — Area of Responsibility
- AR — Army Regulation
- ARCENT — Army Central
- ATTP — Army Tactics, Techniques, and Procedures

B.

- BG — Brigadier General (Army)
- BGen — Brigadier General (Marine Corps)
- Brig Gen — Brigadier General (Air Force)

C.

- Capt — Captain (Air Force)
- Capt — Captain (Marine Corps)
- CAPT — Captain (Navy)
- CCIR — Commanders' Critical Information Requirement
- CCMT — Civilian Casualty Mitigation Team
- CCR — CENTCOM Regulation
- CCTC — Civilian Casualty Tracking Cell
- CDA — Consolidated Disposition Authority
- CDR — Commander (Navy)
- CENTCOM — U.S. Central Command

- CFSOCC-A Component — Combined Forces Special Operations Command-Afghanistan
- CID — U.S. Army Criminal Investigation Command
- CIDNE — Combined Information Data Network Exchange
- CIDR — Criminal Investigation Division Regulation
- CJCS — Chairman of the Joint Chiefs of Staff
- CJCSI — Chairman of the Joint Chiefs of Staff Instruction
- CJCSM — Chairman of the Joint Chief of Staff Manual
- CJIATF — Combined Joint Interagency Task Force
- CJTF — Combined Joint Task Force
- COCOM — Combatant Command
- COIN — Counterinsurgency
- Col — Colonel (Air Force)
- COL — Colonel (Army)
- Col — Colonel (Marine Corps)
- COMISAF Assistance — Commander of International Security Force
- CONUS — Continental United States
- CPT — Captain (Army)
- CSTC-A Afghanistan — Combined Security Transition Command – Afghanistan

D.

- DLPB — Defense Legal Policy Board
- DoD — U.S. Department of Defense
- DoDD — Department of Defense Directive
- DoJ — U.S. Department of Justice

E.

- ENS Ensign (Navy)

F.

- FRAGO Fragmentary Order

G.

- GC General Counsel
- GCMCA General Court-Martial Convening Authority
- Gen General (Air Force)
- GEN General (Army)
- Gen General (Marine Corps)

H.

- HQ Headquarters

I.

- IAD Improvised Explosive Device
- IAT Incident Assessment Team
- ICRC International Committee of the Red Cross
- IG Inspector General
- IO Investigating Officer
- ISAF International Security Assistance Force

J.

- JAGC Judge Advocate General's Corps (Navy)
- JAGINST Judge Advocate General Instruction

- JAGMAN MANUAL OF THE JUDGE ADVOCATE GENERAL
- JFC Joint Force Commander

K.

L.

- LCDR Lieutenant Commander (Navy)
- LOAC Law of Armed Conflict
- LOW Law of War
- LSSS Legal Services Support Section (Marine Corps)
- LT Lieutenant (Navy)
- LTC Lieutenant Colonel (Army)
- Lt Col Lieutenant Colonel (Air Force)
- LtCol Lieutenant Colonel (Marine Corps)
- Lt Gen Lieutenant General (Air Force)
- LTG Lieutenant General (Army)
- LtGen Lieutenant General (Marine Corps)
- LTJG Lieutenant Junior Grade (Navy)
- 1LT First Lieutenant (Army)
- 2LT Second Lieutenant (Army)
- 1st Lt First Lieutenant (Air Force)
- 1stLt First Lieutenant (Marine Corps)
- 2d Lt Second Lieutenant (Air Force)
- 2ndLt Second Lieutenant (Marine Corps)

M.

- MAJ Major (Army)
- Maj Major (Air Force)
- Maj Major (Marine Corps)
- Maj Gen Major General (Air Force)

- MajGen Major General (Marine Corps)
- MCIOs Military Criminal Investigative Organizations
- MCM Manual for Courts-Martial
- MCO Marine Corps Order
- MEJA Military Extraterritorial Jurisdiction Act
- MG Major General (Army)

N.

- NCIS Naval Criminal Investigative Service
- NGO Non-Governmental Organization

O.

- OEF Operation Enduring Freedom
- OGC Office of General Counsel
- OPCON Operational Control
- OPNAVINST Operational Navy Instruction
- OPREP Operational Report
- OSD Office of the Secretary of Defense

P.

- PCS Permanent Change of Station
- PME Professional Military Education
- PTP Pre-deployment Training Program

Q.

R.

- RADM Rear Admiral (Navy)
- RCM Rule for Courts-Martial
- RDML Rear Admiral lower half (Navy)
- ROE Rules of Engagement

S.

- SECARMY Secretary of the Army
- SecDef Secretary of Defense (SecDef)
- SECNAV Secretary of the Navy
- SECNAVINST or SNI Secretary of the Navy Instruction
- SIGACT Significant action
- SITREP Situational Report
- SOP Standard Operating Procedure

T.

- TF Task Force
- TJAG The Judge Advocate General

U.

- UCMJ Uniform Code of Military Justice
- USA U.S. Army
- USACIDC U.S. Army Criminal Investigation Command
- USAF U.S. Air Force
- USCENTCOM U.S. Central Command
- USFOR-A U.S. Forces Afghanistan
- USMC U.S. Marine Corps
- USN U.S. Navy

V.

- VADM Vice Admiral (Navy, Coast Guard)
- VTC Video-Teleconference

W.

- WEBAS Web-Enabled Temporal Analysis System

Appendix V. DLPB Case Studies

I. Haditha cases
II. Maywand District Killings/5-2 Stryker Cases
III. Mahmoudiyah, Iraq/Green Cases

The following is a summary of information provided by the Services in connection with each set of cases. While during this review, the Subcommittee received testimony from the Services regarding three sets of cases that involved the application of military justice in the deployed environment where there was civilian serious injury or death, the Board has not passed judgment upon these cases. Rather the Board and Subcommittee reviewed the specifics of these cases to better assess possible systematic issues within the military justice system. The summaries provided in no way are intended to pass judgment on these cases.

I. Haditha:

Type of Case: Improper Shooting Offenses and Improper Reporting Offenses
Date of Offenses: 19 November 2005
Location: Haditha, Iraq
Service: U.S. Marine Corps
Unit: 1st Squad, 3rd Platoon, Kilo Co, 3rd Battalion, 1st Marines
Nature of Investigation(s): Two AR 15-6 investigations, one JAGMAN investigation (subsequently subsumed by one of the AR-15-6 investigations) and one criminal NCIS investigation.

Service Members Accused of Offenses and Disposition:

Shooting Offenses:

- Sgt Wuterich – Court-Martial
- LCpl Sherrott – Court-Martial, Charges Dismissed
- LCpl Tatum – Court-Martial, Charges Dismissed

Reporting Offenses:

- Division Commanding General - Letter of Censure
- Chief of Staff - Letter of Censure
- RCT-2 Commander - Letter of Censure

- Battalion Commander, LtCol Chessani – Court-Martial, Charges Dismissed, Sent to a Board of Inquiry, forced into early retirement.
- Company Commander, Capt McConnell – Court Martial, Charges Dismissed
- Battalion Legal Advisor, Capt Stone – Court-Martial, Charges Dismissed

On 19 Nov 05, 3rd Battalion, 1st Marines was operating in the Triad Area (Haditha, Haqliniyah, Barwanah) conducting Counterinsurgency Operations with LtCol Jeffery Chessani in command.

At 0716 a four-vehicle patrol composed of 1st Squad, 3rd Platoon, Kilo *Co,3/1* hit an IED in the vicinity of routes "Chestnut" and "Viper" *(*3/1 naming protocol) in Haditha, Iraq. The Squad was returning from re-supply mission and was traveling westbound. The explosion destroyed a HMMWV, instantly killed one popular Marine named LCpl Terrazas and wounded two others, LCpls Crossan and Guzman. The patrol consisted of eleven Marines, one Navy Corpsman, and four Iraqi Army members. The patrol/squad leader, Sgt Wuterich, reported the incident to the Kilo Company command post, requested a medical evacuation, set security, and treated the casualties. In the process the squad engaged a white sedan with five occupants the Squad determined were hostile. All five occupants were killed.

Within minutes of the IED blast, Kilo Company Combat Operations Center (COC) launched two squad-sized Quick Reaction Forces (QRF). The Company Commander, Capt McConnell, led one QRF on foot. The 3d Platoon Commander, 2ndLt Kallop, led the second, vehicle mounted QRF. Lt Kallop's QRF arrived at the scene first and took charge. Sgt Wuterich reported that they had been under small arms fire from the surrounding homes. After assessing the situation, Lt Kallop directed his 1st Squad to "clear south" identifying suspected homes to the South of the IED explosion.

Sgt Wuterich and four members of his squad then cleared at least 5 houses surrounding the IED explosion site. By approximately 0945, there were

24 Iraqi decedents. The decedents included five at the white car; one who was shot while running on a ridge to the South of Route Chestnut; six in what was later identified as “House 1;” eight in what was later identified as “House 2;” and, four in what was later identified as “House 4.” The Marines used hand grenades and small arms to clear the homes. The squad took no casualties during the clearing actions.

At 0800 the Kilo Company Commander, Capt McConnell, physically linked up with Lt Kallop and received an initial report. The report identified that there had been between 10-15 casualties to include civilian "neutrals." This number was based on the Lieutenant's initial post-combat assessment of four of the five homes cleared by his Marines. These casualty numbers were called into the Company COC as an initial report, and subsequently called into the Battalion COC as 8 Enemy Killed in Action (EKIA) and 7 Neutral KIA(NKIA). A member of the Human Exploitation Team (HET) was with Capt McConnell and commenced exploitation of the site to include photographing the majority of casualties.

This incident took place as other elements of 3/1 engaged in simultaneous combat operations.

Capt McConnell set up a MEDIV AC LZ to evacuate wounded Marines. He also evacuated three wounded Iraqi's including two children from one of the houses cleared by Sgt Wuterich's squad, and one suspected enemy that the QRF with Capt McConnell had engaged during movement to the IED blast site. After the casualties were evacuated, Capt McConnell directed Lt Kallop to move with a Tank Section and QRF to support a concurrent attack by elements of 4th Platoon on a suspected enemy safehouse (hereafter referred to as "X-380") located 1 kilometer to the Southeast. Capt McConnell also went to the X-380 attack. Capt McConnell only saw the casualties from the white car engagement while in the vicinity of the Chestnut and Viper intersection (hereafter referred to as "Chestnut/Viper") that day. He never went into the cleared houses.

Actions at X-380 were initiated when a Scan Eagle Unmanned Aerial Vehicle (UAV) under the control of the *3/1* COC tracked suspected insurgents egressing from various IED sites around the city. The insurgents were using a blue sedan that was tracked to the X-380 safe house. The Battalion COC engaged the house with Close Air Support (CAS) and directed elements of 4th Platoon to conduct a Cordon and Search that was broken up by an enemy grenade attack. The safehouse was subsequently destroyed by CAS under Battalion control. Kinetic actions at X-380 were complete by 1340 with 6 FWIA (2 Priority), 4 EKIA and one enemy detainee with the recovery of some small arms.

The Kilo COC sent a third QRF Squad under the command of 1stLt Frank (1st Platoon Commander) to Chestnut/Viper to relieve Sgt Wuterich's Marines at 1200. Lt Frank initially set up security and received a report from Sgt Wuterich and the HET Team Leader. He then toured the entire site, to include all the cleared homes. Lt Frank was the most senior officer to see all the casualties in their original locations following the clearing operations. He was subsequently ordered to evacuate all the casualties to the Kilo Co COC. Prior to evacuation, all the bodies were photographed by the HET. A total of 24 bodies were evacuated from this site by Lt Frank and initially delivered to the Kilo COC by 2000. They were later moved to the Haditha Hospital at approximately 2300 by the Company GySgt and Civil Affairs Group (CAG) Officer.

The Battalion COC tracked all the above actions via reports from the Kilo COC and utilizing a Scan Eagle UAV. The actions at Chestnut/Viper were controlled initially by Sgt Wuterich, then by Lt Kallop, by Capt McConnell for the short period he was on scene, and finally by Lt Frank. The actions at X-380 were controlled by the Bn COC (Positive Identification [PID] of Enemy and Safehouse via Scan Eagle, clearance of CAS, directions to 4th Platoon to search safehouse and pursue 'leakers"). There were no "actual to actual" conversations between LtCol Chessani

and Capt McConnell until LtCol Chessani physically moved to the X-380 site at some time between 1630 and 1730. Prior to that time, LtCol Chessani monitored the battle from the Bn COC.

LtCol Chessani toured the X-380 site with Capt McConnell until returning to the Kilo Co Firm Base at 1930. He chose not to go to the Chestnut/Viper site that evening. At the Kilo Firm Base he received a "very short brief' from Capt McConnell about his understanding of the actions at Chestnut/Viper. The brief included information that there were 8 EKIA and up to 15 civilian casualties including women and children, as well as some discussion of the clearing methods used by the Kilo Co Marines. Capt McConnell's understanding at the time was that the Marines were responding to heavy fire from insurgents intermixed with civilians. During his visit on the 19th, LtCol Chessani did not interview any of the Marines who were directly involved in the actions at Chestnut/Viper, nor did he direct Capt McConnell to do any additional investigation into the civilian deaths.

LtCol Chessani returned to his Battalion Command Post (CP) located 12 km north at the Haditha Dam complex (30 min drive) arriving between 2000 and 2100. On arrival LtCol Chessani discussed his observations with his XO and confirmed the casualty numbers for a Journal Entry Note update (JEN 20-007) the COC was preparing to release. He then called the RCT-2 Commander to discuss the day's events. LtCol Chessani relayed his understanding of the civilian losses at that time including that women and children had been killed, that homes had been entered, and "that we killed civilians during the ensuing fire fight." The RCT-2 Commander accepted the account, but directed LtCol Chessani to "look into this further" (The RCT-2 Commander was deployed to Op Steel Curtain at the time). LtCol Chessani was shown a final version of JEN 20-007 by the Battalion S-3, prior to its release at 2400 on 19 Nov 2005.

Three JENs were sent out by 3/1 reporting on the actions at Chestnut/Viper. JENs were the primary reporting channel for RCT-2 subunits, and were used as source documents for reports to Division especially with regard to Significant Events and Commanders Critical Information Requirements (CCIR). They were also routinely used as historical references. Other mediums like voice land lines, Radio, "MIRC CHAT', and Intentions Messages were used to augment information reported in JENs. RCT-2 had published guidance (including a 15 Sept 2005 Frag-O) on the use of JENs, standardized reporting, and the necessity to "accurately report information in a timely manner."

JEN 19-008 (DTG 190716) was the initial report on the Chestnut/Viper IED attack. It focused on the IED (location, type, damage), friendly and enemy casualties (1 FKIA, 2 FWIA, 5 EKIA, and 1 EWIA), and some initial site exploitation. JEN 19-019 updated JEN 19-008 with more specific information on the IED attack per RCT-2 CCIR requirements. JEN 20-007 was the final 'update sent out on the incident. It was seen by the S-3, XO, and reviewed by LtCol Chessani prior to release at 2400 on 19 Nov 2005. JEN 20-007 stated:

> There was a total of (8) EKIA, (1) EWIA who was medevaced out, and (15) NKIA, and (2) NWIA medevaced. Post engagement assessment has determined that the combined 3/1 and 2-2-7 IA [Iraqi Army] patrol was attacked as it was moving past a group of neutral IZ's [Iraqis]. The ensuing blast and TIC [troops in contact] contributed to the number of NKIAs. AIF elements then engaged CF [Coalition Forces] from within residential structures in the area further adding to NKIAs as a result of returned fire by CF. Commanding officer 3/1 moved to the scene to conduct a command assessment of the events.

LtCol Chessani did not physically go to the scene of the Chestnut/Viper IED attack until the afternoon of the 20th. When he went, he was accompanied by his XO, and Sgt Maj. He did not have any personnel from Kilo Company or any witnesses to the actual events with him during his visit. LtCol Chessani observed the site for approximately

30 minutes, paying most attention to the IED explosive effects and the immediate surroundings of the intersection, as well as the "geometry of fires" as he understood them. He did not go into any of the surrounding homes.

On either the night of the 19th or the 20th, LtCol Chessani's XO asked LtCol Chessani if an investigation would be required with respect to the NKIAs, but LtCol Chessani told his XO that "he [Chessani] had it for action."

The Battalion developed a "Story Board" per RCT-2 SOP to outline all the Battalion's major actions on the 19th. The Story Board was reviewed by the Battalion Staff and Commanders, including LtCol Chessani and Capt McConnell at a subsequent Battle Update Brief (BUB) on 20 Nov 05. The Story Board focused on actions of the Battalion and the enemy in zone including assessed casualties for both forces, but it did not depict any of the neutral casualties' statistics. This Story Board was later sent to RCT-2 and was used as the basis of a brief delivered to MajGen Huck during his visit to Haditha on 22 Nov 05. During that brief, the S-3 verbally explained the civilian casualties as the unfortunate result of the enemy's choice to fight amongst them using the same scenario described in JEN 20-007. This same Story Board was used again in late Jan 06 to answer 2ndMarDiv PAO inquiries in response to a Time Magazine investigation of the civilian casualties sustained in Haditha on 19 Nov 05.

On 27 Nov 05, the Haditha City Council met and presented LtCol Chessani with a written and oral demand for an investigation into the 24 civilian deaths in the vicinity of Chestnut/Viper on 19 Nov 05. LtCol Chessani disputed the validity of the number of casualties and that his Marines had acted improperly. Instead, he blamed the insurgents for the civilian deaths and the city for harboring them. However, he also said he would look into the incident and offered compensation to ease the

suffering of the affected families. At the direction of LtCol Chessani, his CAG Officer later made Solatia payments for 15 of the identified NKIAs and the 2 wounded children.

The Battalion never did a written investigation of the actions at Chestnut/Viper on 19 Nov 05. None of the Marines actually involved in the civilian deaths on 19 Nov 05 were ever interviewed on their actions that day by any of the Battalion leadership above the rank of 1stLt. 2ndLt Kallop, 2ndLt Frank, and 1stLt Mathes were the only officers to ask the Marines involved any specific questions about the civilian deaths. Neither the Battalion nor Kilo Company ever did an After Action Review (AAR) of the actions at Chestnut/Viper on 19 Nov 05.

The complex attack on 19 Nov 05 was the first significant combat action for Capt McConnell (Kilo Co Cmdr), 2ndLt Kallop (3rd Plt Cmdr), Sgt Wuterich (1st Sqd Ldr), and 2 (Cpl Salinas, LCpl Tatum) of the 4 Marines who cleared the 5 houses around Chestnut/Viper.

Following an inquiry from Mr. Timothy McGirk of Time Magazine in late Jan 06, the Battalion S-3 and XO recommended to LtCol Chessani that he initiate an investigation. LtCol Chessani responded, "My men are not murderers" and did not order an investigation.

On 14 Feb 2006, Commander, MNC-I ordered an AR 15- 6 Investigation into the shootings at Chestnut/Viper, and appointed Colonel Watt, U.S. Army, to conduct the investigation. Colonel Watt found that there had been no intentional targeting of noncombatants at the Chestnut/Viper incident. However, he also found that there had been failures to positively identify (PID) targets prior to engaging, and he recommended further investigation by CID/NCIS.

On 12 Mar 2006, CG, MNF-West (MajGen Zilmer) directed an NCIS investigation into the Chestnut/Viper shootings. Additionally, MajGen

Zilmer directed a JAGMAN investigation into the combat reporting that took place in connection with the events of 19 November 2006.

On 19 Mar 2006, Commander, MNC-I, appointed Major General Bargewell, U.S. Army, to conduct an AR 15-6 Investigation into the official combat reporting through all levels of command and the ROE/LOAC training of the Marines involved in the engagement. The AR 15-6 subsumed the MNF-West JAGMAN Investigation.

Major General Bargewell's 15-6 concluded that the reporting was untimely, inaccurate, and incomplete. NCIS conducted additional investigation that included e-mail seizure. The Division Commanding General, the Chief of Staff, and the RCT-2 Commander all received letters of censure.

The Battalion Commander, LtCol Chessani, the Kilo Company Commander, Capt McConnell, and Battalion legal advisor, Capt Stone were all charged in connection with the reporting failures.

The Article 32 investigating officer in LtCol Chessani's case concluded that LtCol Chessani "failed to thoroughly and accurately report and investigate a combat engagement that clearly needed scrutiny, particularly in light of the requirements of MCO 3300.4. He failed to accurately report facts that he knew or should have known and reported at least one critical fact he specifically knew to be false . . . to his higher headquarters." The Article 32 investigating officer concluded Lieutenant Colonel Chessani violated a lawful general order, MCO 3300.4, and was derelict in the performance of his duties. After a lengthy prosecution involving significant appellate issues surrounding an allegation of unlawful command influence (UCI), the SECDEF directed that Lieutenant Colonel Chessani be involuntarily retired.[189]

[189] After referral of charges against Lieutenant Colonel Chessani, Lieutenant Colonel Chessani's defense counsel filed a motion to dismiss all charges alleging that the I MEF SJA's presence at the MARCENT/IMEF joint legal meetings contributed to a "prosecutorial mindset" at those meetings and (most notably among other assertions) chilled the MARCENT SJA from extending independent legal advice, thereby constituted UCI. The military judge granted the defense motion, finding the government failed to prove beyond a

The Consolidated Disposition Authority (CDA) dismissed case against the battalion legal advisor following an Article 32 investigation. As additional testimony became available, charges were also dismissed against Capt McConnell.

Limited forensic analysis of the scene was done in connection with the NCIS investigation of the Chestnut/Viper shootings. This limited analysis was due to the following: NCIS Agents did not conduct an analysis until March of 2006, almost four months after the shootings; Houses 1 and 2 were largely repaired and repainted in the interim; the images of 24 decedents were taken for identification purposes, not forensic evaluation; and no bodies were available for forensic analysis. (On 30 Mar 2006, NCIS Agents met with families of the 24 decedents and requested exhumation of the bodies. The Iraqi family members refused exhumation.)

The government simultaneously preferred charges on 21 Dec 06 against three members of Sgt Wuterich's squad in connection with the Chestnut/Viper shootings: Sergeant Wuterich; Lance Corporal Sharratt; and Lance Corporal Tatum. Article 32 Investigating Officer recommended dismissal of charges against Lance Corporals Sharratt and Tatum. The charges against Lance Corporal Sharratt were dismissed. Lesser charges were referred against Lance Corporal Tatum, but later dismissed.

At Sergeant Wuterich's Article 32, eyewitnesses provided multiple and conflicting sworn statements. Sergeant Wuterich was originally charged with the following:

- 12 specifications of Art 118 – Murder: intent to inflict great bodily harm (5 at White Car; 6 at House 2; and 1 at House 4);

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reasonable doubt that UCI or the appearance of UCI did not exist in connection with the involvement of the convening authority, the MARCENT SJA, and/or the deputy MARCENT SJA regarding the charging, discovery, and/or other legal advisory decisions connected to the Chessani case. The judge further disqualified any commander from MARCENT, I MEF, or Joint Forces Command from serving as the convening authority in any future disposition of the case. The Government appealed the dismissal to the Navy-Marine Corps Court of Criminal Appeals. The appellate court affirmed the underlying dismissal ruling. Ultimately, LtCol Chessani was forced to show cause before a Board of Inquiry, and he was involuntarily retired from the Marine Corps.

- 1 specification of Art 118(3) – Murder: wanton disregard of human life (All 6 persons in House 1);
- 2 specifications of Art 134 – Obstruction of Justice (evidence indicated Sergeant Wuterich asked one of the Marines in his squad to lie about the white car engagement); and
- 1 specification of Art 107 – False Official Statement

The Article 32 Investigating Officer opined that the Government would likely only be able to prove Dereliction of Duty beyond a reasonable doubt. Nevertheless, the CDA referred the following charges:

- 3 specification of Art 92 – Dereliction of Duty (White Car, House 1 & House 2);
- 9 specifications of Art 119 – Voluntary Manslaughter (White Car & House 2);
- 2 specifications of Art 128 – Aggravated Assault (Houses 1 & 2); and
- 1 specification of Art 134 – Obstruction of Justice.

The trial began on 4 January 2012. On 23 January 2012, the CDA approved a pretrial agreement. On 23 January 2012, Sergeant Wuterich pled guilty to Dereliction of Duty (Art 92) for issuing order of "shoot first and ask questions later." Sergeant Wuterich was sentenced to confinement for 90 days, reduction to E-1, and forfeiture of $984.06 pay per month for 3 months. Per the pretrial agreement, confinement was disapproved.

Sergeant Wuterich was aggressively prosecuted. The goal was to hold senior Marine accountable to the military justice process. Significant appellate issues presented themselves throughout the case, and appellate stays contributed to the delay that existed in the case. Specifically, the government litigated three significant appellate issues: First, the government sought to obtain out-takes from a 60-Minute interview of Sergeant Wuterich. Three appellate opinions were issued in connection with this issue: two at NMCCA; and one at CAAF. CBS News joined the litigation and sought to preclude government access to the out-takes. Second, Sergeant Wuterich's counsel made an allegation of Unlawful Command Influence that required significant high-level testimony. Finally, two appellate arguments were required to address issues

related to the severance of counsel. Ultimately, the government prevailed on all three issues.

II. Maywand District Killings/5-2 Stryker Cases:

Type of Case: Conspiracy to Commit Murder and Murder of Afghan Civilians
Date of Offenses: 2010
Location: Kandahar Province, Afghanistan
Service: U.S. Army
Unit: Company B, 2nd Battalion, 1st Infantry Regiment, 5th Brigade, 2d Infantry Division
Nature of Investigation(s): Criminal Investigation by USACID (CID)

Soldiers Accused of Offenses and Disposition:

- PFC Andrew Holmes – Court-Martialed
- SPC Michael Wagnon – Court-Martial Charges Dismissed
- SPC Adam Winfield – Court-Martialed
- SSG Calvin Gibbs – Court-Martialed
- SPC Jeremy Morlock – Court-Martialed
- Seven other Soldiers were charged with related offenses

Five Stryker Brigade (5-2) Soldiers from Joint Base Lewis-McChord were initially charged with the 2010 murders of three Afghan civilians in Kandahar province, Afghanistan, and collecting their body parts as trophies. In addition, seven other Soldiers were charged with other crimes such as hashish use, impeding an investigation, and attacking the whistleblower Private First Class J.S.

The Afghan civilians were killed in three separate incidents in early 2010. The investigation indicated that all three victims were shot and two of them were hit by thrown grenades. All of the three staged killings of Afghan civilians occurred in the Maywand district of Afghanistan. On 15 January 2010, in the village of La Mohammad Kalay, fifteen year old Gul Mudin was doing farm work for his father. He was unarmed and killed "by means of throwing a fragmentary grenade at him and shooting him with a rifle," an action carried out by SPC Jeremy Morlock and PFC Andrew Holmes under the direction of SSG Calvin

Gibbs. On 22 February 2010, using thermal imagery, the 5-2 Soldiers discovered Marach Agha curled in a ball by a roadside. It is believed Marach Agha was deaf or mentally disabled. SSG Gibbs and SPC Michael S. Wagnon allegedly shot him and placed a Kalashnikov rifle next to the body to justify the killing. SPC Morlock pled guilty to his murder. The Soldiers allegedly kept part of his skull.

On 2 May 2010, Mullah Adahdad was attacked with a grenade and fatally shot by SSG Gibbs, SPC Morlock, and SPC Winfield. Three days after Adahdad was killed, members of the Stryker platoon returned to his village. Tribal elders had complained to U.S. Army officers that the cleric had been unarmed and that the shooting was a setup. "This guy was shot because he took an aggressive action against coalition forces," 1LT Stefan Moye, the platoon leader, explained to village residents in Qualaday. "We didn't just [expletive] come over here and just shoot him randomly. And we don't do that." This conversation was recorded by embedded photojournalist Max Becherer.

During each incident, the 5-2 Soldiers planted evidence (i.e., grenade, AK-47, etc.) so as to appear that they were under attack, thus justifying the use of force against the civilians. All three incidents were falsely reported to the Soldiers' chain of command as hostile contacts. Prior to any investigation, three photos of U.S. Soldiers posing with the bodies of Afghans they had killed were published in a German magazine. One of the photos shows SCP Jeremy Morlock next to one of them. He appears to be smiling and raising the head of a corpse by the hair. Other images published later include one of two unidentified Afghans cuffed together around a milestone and wearing a cardboard handwritten sign made out of a MRE package box that read "Talibans are Dead". Other photos were taken of mutilated body parts, among them one of a head being maneuvered with a stick. Two videos were also published, one of two possibly armed Afghans on a motorcycle gunned down by members of another battalion of the 5th Stryker brigade called "Motorcycle Kill" and one called "Death

Zone" of gun sight footage with jeering heard in the background showing two Afghans suspected of planting an IED killed in an airstrike.

In early May 2010, a 5-2 Soldier not involved in the murders, PFC J.S., reported that many Soldiers in his unit, who were also some of the same Soldiers who participated in the killings, had been using hashish in his room. When the 5-2 Soldiers learned that PFC J.S. had reported them, they allegedly entered his room, punched and kicked him, spat on him, and threatened him. The initial investigation into the assault on PFC J.S. and illegal drug use within the platoon ultimately resulted in an extensive CID investigation which under covered the allegations of the murder of the Afghan civilians. The criminal investigation by CID also revealed that some Soldiers took body parts (fingers) as trophies and allegedly photographed dead enemy combatants or posed with deceased Afghans, sending pictures over the internet. Specifically, the investigation revealed that SSG Gibbs used medical shears to sever several fingers that he kept as a form of human trophy collecting and that he gave one of the fingers to PFC Andrew Holmes, who kept it dried in a Ziploc bag. PFC Andrew Holmes, SPC Michael Wagnon II, and SPC Adam Winfield were each charged with one specification of premeditated murder. SSG Calvin Gibbs and SPC Jeremy Morlock each were charged with three specifications of premeditated murder and one specification of assault. In all, five Soldiers were charged with premeditated murder in the killings. All are assigned to B Company, 2nd Battalion, 1st Infantry Regiment, 5th Stryker Brigade Combat Team, 2nd Infantry Division. The charged Soldiers referred to themselves as the "Kill Team." Two of the charged Soldiers were also accused of assault and another was charged with seeking to destroy evidence. The remaining soldiers have been charged with less serious offenses, to include assault (on a Soldier and Afghan civilians), conspiracy to assault, drug use, obstruction of justice, and maltreatment.

SSG Robert Stevens was tried by a military judge sitting alone as a general court-martial on 1 December 2010 at Joint Base Lewis-McChord (JBLM). He was convicted of aggravated assault with a loaded firearm on civilian,

reckless endangerment, willful dereliction of duty, and false official statement. He was sentenced to confinement for nine months, total forfeitures and reduction to E1. The case is currently pending Article 69(a) review.

SPC Emmitt Quintal was tried by a military judge sitting as a special court-martial (BCD) on 5 January 2011 at JBLM and convicted of use of illegal drugs, assault of a U.S. Soldier, and wrongful possession of photos of civilian casualties. He was sentenced to reduction to E2 and a bad-conduct discharge. The U.S. Army Court of Criminal Appeals affirmed the finding and sentence on 3 May 2012. The U.S. Court of Appeals for the Armed Forces denied the petition for review.

SPC Ashton Moore was court-martialed on 28 January 2011. He was convicted of use of hashish and sentenced to forfeiture of one half month's pay and reduction to E1.

SPC Adam Kelly was tried by a military judge sitting alone as a general court-martial on 23 February 2011 at JBLM and convicted of assault consummated by a battery and conspiracy to commit assault. He was found not guilty of obstruction of justice and use of hashish. He was sentenced to 24 days hard labor without confinement and a bad-conduct discharge. The U.S. Army Court of Criminal Appeals affirmed the finding and sentence on 2 November 2012. The U.S. Court of Appeals for the Armed Forces denied the petition for review.

SPC Corey Moore was court-martialed by a military judge sitting alone as a general court-martial on 2 March 2011 at JBLM and convicted of an assault on a U.S. Soldier, stabbing an Afghan corpse as an Article 134 offense, and use of hashish. He was found not guilty of conspiracy to commit assault on a U.S. Soldier and obstruction of justice. He was sentenced to two months hard labor without confinement and a bad-conduct discharge. The case is currently pending at the U.S. Army Court of Criminal Appeals.

On 23 March 2011, SPC Jeremy Morlock pled guilty to three specifications of premeditated murder of Afghan civilians, conspiracy, obstruction of justice, and use of hashish. He told the court that he had helped to kill unarmed native Afghans in faked combat situations. The court-martial sentenced him to confinement for life, reduction to E1, total forfeitures, and a dishonorable discharge. Pursuant to a pretrial agreement, the period of confinement was reduced to twenty-four years confinement. His pretrial agreement required him to testify against the remaining charged Soldiers. This case is currently pending before the U.S. Army Court of Criminal Appeals.

SGT Darren Jones pleaded not guilty at a general court-martial composed of both officer and enlisted members on 6 July 2011 at JBLM. He was convicted of two specifications of assault consummated by a battery. He was sentenced to seven months confinement and reduction to E1.

On 5 August 2011, SPC Adam Winfield was court-martialed and he was convicted of involuntary manslaughter and wrongful use of a controlled substance. He was sentenced to three years confinement, total forfeitures, reduction to E1 and a bad-conduct discharge.

On 23 September 2011, PFC Andrew Holmes was court-martialed and convicted of murder while engaging in an inherently dangerous act, wrongful use of a controlled substance, and possession of a human finger charged as a violation of Article 134. He was sentenced to fifteen years confinement, reduction to E1, total forfeitures of pay and allowances, and a dishonorable discharge. The terms of the pretrial agreement limited the period of confinement to seven years. This case is currently pending before the U.S. Court of Criminal Appeals.

On 10 November 2011, SSG Calvin Gibbs pleaded not guilty to all charges and specifications at a general court-martial composed of a military judge sitting alone. He was convicted of conspiracy to commit premeditated murder (three specifications), premeditated murder (three specifications), assault

consummated by a battery, assault with a dangerous weapon, dereliction of duty, failure to obey an order or a regulation, obstruction of justice, soliciting another to cut a finger off a male corpse (a violation of Article 134), and possession of human body parts (as a violation of Article 134). He was sentenced to confinement for life with the eligibility of parole, reduction to E1, total forfeitures of pay and allowances, and a reprimand. This case is currently pending before the U.S. Court of Criminal Appeals.

On 18 November 2011, SSG David Bram pleaded not guilty at a general court-martial composed of officer and enlisted members at JBLM and convicted of conspiracy to commit assault, obstruction of justice, soliciting another soldier to murder Afghan civilians, assault of a U.S. Soldier, wrongful photography of human corpses and possession of visual images of corpses, dereliction of duty, and maltreatment. He was found not guilty of wrongfully placing an AK 47 magazine next to an Afghan corpse and assault on Afghan detainees. He was sentenced to confinement for five years, reduction to E1, total forfeitures of pay and allowances (with recommendation that convening authority defer for six months), and a dishonorable discharge. This case is currently pending before the U.S. Army Court of Criminal Appeals.

The original charges against SPC Michael Wagnon II alleging premeditated murder of an Afghan civilian, aggravated assault of Afghan civilian, and possession of a human body part were dismissed on 2 February 2012 based upon a review of the evidence. New charges, alleging possession of visual image of human casualties, failure to obey an order, assault, and drunk and disorderly were referred to a special court-martial (BCD) on 1 March 2012. This final case was disposed of when the convening authority approved an administrative discharge in lieu of court-martial for SPC Michael Wagnon II on 26 March 2012. The administrative discharge resulted in his automatic reduction to E1, and he was separated with an other than honorable discharge.

III. Mahmoudiyah, Iraq/Green Cases:

Type of Case: Rape, Murder of Iraqi Civilians
Date of Offenses: 12 March 2006
Location: Mahmoudiyah, Iraq
Service: U.S. Army
Unit: Company B, 1st Battalion, 502d Infantry Regiment, 101st Airborne Division (Air Assault)
Initial Report: Combat Stress Counselor, Company Commander, Battalion Commander, CID
Nature of Investigation: Criminal Investigation by USACIC (CID)
Soldiers Accused of Offenses and Disposition:

- Mr. (PFC (E3)) Steven D. Green – Tried by DOJ (MEJA)
- SGT (E5) Paul E. Cortez – Court-Martial
- SPC (E4) James P. Barker – Court-Martial
- PFC (E3) Jesse V. Spielman – Court-Martial
- PFC (E3) Bryan L. Howard – Court-Martial
- SGT (E5) Anthony W. Yribe – Involuntarily Administrative Separation with an Other Than Honorable Discharge

Summary of the Case:

In September 2005, Company B, 1st Battalion, 502d Infantry Regiment, 101st Airborne Division (Air Assault) deployed to Iraq, where the unit was assigned in and around Mahmoudiyah, Iraq, south of Baghdad. On the afternoon of 12 March 2006, then PFC Steven D. Green, SGT Paul E. Cortez, SPC James P. Barker, PFC Jesse V. Spielman, and PFC Bryan L. Howard, were playing cards and drinking whiskey, in violation of General Order Number 1, at U.S. Army Traffic Control Point 2 (TCP-2), when PFC Green stated that he wanted to kill some Iraqi civilians. His intention to kill Iraqi civilians was ostensibly assumed to be in retaliation for the deaths of several fellow members of his unit. However, prior to 12 March 2006, PFC Green had mentioned hating Iraqis and that he wanted to kill some Iraqi nationals, though his fellow Soldier did not take his comments seriously. After PFC Green persisted on 12 March 2006, his comrades took him seriously and SPC Barker eventually agreed to go along with PFC Green's plan. Specialist Barker told PFC Green that he knew of a nearby house where an Iraqi man and three females lived. Specialist Barker also

suggested that they have sex with one of those females who they had seen in the past. The rape of fourteen-year-old Abeer Kassem Hamza Al-Janabi was the primary motivation for the group. It was SPC Barker's suggestion to PFC Green and SGT Cortez that they rape the girl that gained SGT Cortez's agreement and ultimately moved the plan from idle talk into action.

Before leaving, SPC Barker and SGT Cortez changed into black clothing and covered their heads with black ski masks; PFC Spielman worn only his ACU pants with a tan t-shirt; PFC Green disguised himself by wrapping a brown Army-issued undershirt across his face. No one wore either their body armor or helmet. When they departed at approximately 1300 hours, PFC Green carried a shotgun; the others carried either M4 or M14 rifles. PFC Howard remained at TCP-2 and was instructed to alert the others with an ICOM, two-way radio, if he saw any U.S. Army or Iraqi Army personnel approaching TCP-2. The group left TCP-2 through a gap in the wire fence surrounding it and headed into a field, which led to a chain-link fence some 400 meters away. The group cut a hole in the second fence and passed through to the other side. Once there, the Soldiers ran to the house SPC Barker had selected.

PFC Green and PFC Spielman approached a man, Kassem Hamza Rachid Al- Janabi, and his six-year-old daughter, Hadeel Kassem Hamza Al-Janabi, who were standing outside, and forced them inside. Fakhriya Taha Mohsine Al-Janabi, Kassem's wife, was present inside, along her fourteen-year-old daughter, Abeer Kassem Hamza Al-Janabi. PFC Green and PFC Spielman forced Kassem, Fakhriya, and Hadeel into a bedroom. The family’s two young sons, ages thirteen and ten, were not present in the home at the time. PFC Spielman closed the door to that room and stood outside, leaving PFC Green inside the room. Meanwhile, SGT Cortez and SPC Barker pulled Abeer into the living room. Sergeant Cortez pushed her to the ground, pulled off some of her clothes, including her pantyhose, and pushed her dress up above her waist. SGT Cortez and SPC Barker then took turns raping her while forcibly restraining her while PFC Spielman watched the repeated rapes. During the rape, a flurry of

gunshots went off inside the bedroom and PFC Spielman moved away from the door only to avoid being hit by ricocheting rounds, while SGT Cortez and SPC Barker continued their assault on Abeer without pause. Inside the room, PFC Green shot Kassem in the head with his shotgun before killing Hadeer and Fakhriyah with Kassem's AK-47. He shot Hadeer in the face and Fakriyah in the torso, approximately center of mass. During the shooting, PFC Green dropped a shotgun shell, and despite searching for it, was unable to locate it at the time. Responding to PFC Spielman's knocking, PFC Green opened the door and told PFC Spielman that he was okay. PFC Spielman and PFC Green then entered the living room. It appeared that Fakhriyah may have survived for a few minutes after PFC Green left the room, because one of the responding Iraqi medics said he had to force the door to the bedroom open because Fakhriyah had braced her legs against it from the inside.

PFC Green placed an AK-47 rifle that he had brought with him from the bedroom in the corner of the living room, and announced that everyone else was dead and that he had killed them. PFC Green, who at that point was "wigging out, acting all irate, breathing heavy, and pacing a little," began sexually assaulting Abeer while SGT Cortez held her arms down. When PFC Green finished assaulting Abeer, he retrieved the AK-47 rifle, covered Abeer's head with a pillow, and shot her several times in the face with the rifle. PFC Spielman then approached the dead body of Abeer, lifted her shirt, and touched her breasts.

A member of the group then suggested that they burn Abeer's body, so SPC Barker poured kerosene from a lamp he had found onto Abeer's body. PFC Spielman handed SPC Barker his lighter, and SPC Barker then lit her body on fire. The group then exited the house after PFC Green stated that he had opened a propane-tank valve in the house in order to set off an explosion. The house, however, did not explode nor was it destroyed by the fire. At some point during the rape and murders, PFC Howard radioed one of the group and warned them that a military vehicle, HMMWV was approaching TCP-2. The group returned undetected to TCP-2 the same way they had come. When they arrived,

some of them removed their clothing and placed it in an exterior burn pit used for refuse. SGT Cortez ordered PFC Spielman to dispose of the AK-47 rifle, which PFC Green had brought back with him; PFC Spielman took the rifle and threw it into the canal across from TCP-2. PFC Green was later overheard describing the events of the day as "awesome."

Later that afternoon, several Iraqi civilians reported to TCP-1, another nearby traffic checkpoint, that a house located behind TCP-2 had been burned, and that several bodies, one of whom was a woman who apparently had been raped and burned, were inside. The noncommissioned officer in charge of TCP-1 called TCP-2 and stated that he was sending a patrol to check on the house behind TCP-2 and that he needed additional manpower. Twenty or so minutes later, SGT Anthony W. Yribe proceeded to TCP-2 with an Iraqi interpreter and several members of the Iraqi Army who were also stationed at TCP-1. They, along with SGT Cortez and PFC Spielman, went to the house to investigate. Upon their arrival, the investigation team immediately observed the deceased remains of a woman who had been shot in the face with a substantial portion of her body burned beyond recognition. The team also discovered three dead bodies in an adjacent room, each of whom had been shot at close range in the head or the chest. The investigation team attributed these killings to “unknown Iraqi insurgents.” SGT Yribe took several photographs of the bodies and the crime scene. He also saw a spent shotgun shell in the bedroom. The investigation team did not report the murders to any military criminal investigative organization, such as the U.S. Army Criminal Investigations Command (CID), and no crime scene investigation was initiated.

When the investigation team returned to TCP-2, PFC Green, in SPC Barker's presence, told SGT Yribe that he killed all of the Iraqi civilians. SGT Yribe discounted PFC Green’s admission because he did not believe that one person could have committed the crimes alone and also because PFC Green was known as someone who told tales. Later in the day, SGT Yribe met with his superior noncommissioned officer and with the company commander about the

investigation, but he did not disclose PFC Green's admission. The next day, 13 March 2006, SGT Yribe, in SPC Barker's presence, asked PFC Green about the events of the prior day, and PFC Green again admitted to committing the murder. Again, SGT Yribe failed to report the murders to anyone in his command or to any military criminal investigation organization. Once SGT Yribe began to believe that PFC Green had committed the murders, he told PFC Green to “get out of his Army” and that the murders were “between him and God.”

On 28 March 2006, following an earlier meeting with a Combat Stress Team, PFC Green was diagnosed with an anti-social personality disorder and an adjustment disorder with depressed mood. On 14 April 2006, PFC Green received a written notice from his company commander indicating that he was initiating an involuntary separation action pursuant to Army Regulation 635-200, paragraph 5-13 to separate PFC Green from the Army because of his personality disorder based on a determination that it "interferes with [Green's] ability to perform [his] duties and be a productive soldier." PFC Green was released from the Iraqi theater of operations on 3 May 2006. By 16 May 2006, fifteen months after enlisting in the U.S. Army, PFC Green had completed his out-processing, received his final pay, and was issued a Department of Defense Form 214, Certificate of Release or Discharge from Active Duty. He received an honorable discharge. At the time of his discharge, the Army was still not aware of PFC Green’s involvement in the murders.

In late June 2006, during a debriefing with a combat stress counselor, a member of the former PFC Green's former unit not involved in the rapes and murders reported that American Soldiers had raped and killed an Iraqi female and killed three other Iraqis in March 2006. This information, which contradicted the initial investigation team's report blaming those killings on Iraqi insurgents, was conveyed up the chain of command. On 24 June 2006, the battalion commander interviewed SPC Barker, SGT Cortez, PFC Spielman, and PFC Howard. The battalion commander then referred the information he had gathered to the United States Army Criminal Investigation Command (CID),

which began a formal criminal investigation. On 25 June 2006, CID agents arrived at Forward Operating Base Mahmoudiyah and investigators interviewed witnesses, including SPC Barker, SGT Cortez, PFC Spielman, and PFC Howard, each of whom provided a written statement admitting to varying degrees of participation in both the sexual assault of Abeer and the ensuing murders. SPC Barker, SGT Cortez, and PFC Spielman identified the former PFC Green as the triggerman for all four murders. Investigators also obtained a written statement from SGT Yribe, in which he revealed the two incriminating statements that the former PFC Green had made to him shortly after the crimes. In addition, investigators met with a friend of the former PFC Green and two other Soldiers, each of whom stated that the former PFC Green had admitted that he had raped an Iraqi girl and killed her and her family. The investigation into the offenses was completed largely by CID, however, the FBI provided assistance when an effort was made to locate the AK-47 used in the crime. The FBI sent a dive team to scour the canal where the AK-47 was disposed of by PFC Spielman. The weapon was never recovered.

SPC Barker, SGT Cortez, PFC Spielman, and PFC Howard were then prosecuted by the U.S. Army under Uniform Code of Military Justice (UCMJ) for their roles in the Al-Janabi murders. Following a joint Article 32 Investigation conducted held in Baghdad, Iraq, SPC Barker, SGT Cortez, and PFC Spielman were each court-martialed at Fort Campbell, Kentucky at general courts-martial on charges including murder, rape, conspiracy, obstruction of justice, arson, and housebreaking. The charges against SGT Yribe for his failure to report the crimes were also investigated at the same joint Article 32 Investigation. The uncle of Abeer Kassem Hamza Al-Janabi testified at the Article 32 Investigation in theater. The convening authority referred the charges in the cases of SGT Cortez and SPC Barker to courts-martial authorized to adjudge a death sentence.

Specialist Barker was charged with conspiracy to commit murder, conspiracy to commit rape, conspiracy to obstruct justice, violating a lawful

general order, premeditated murder, rape, arson, house breaking, and obstruction of justice. On 16 November 2006, in order to avoid the possibility of the government seeking the death penalty, SPC Barker pleaded guilty at his general court-martial at Fort Campbell, Kentucky, pursuant to a pretrial agreement – which also required him to testify against the other Soldiers involved. He was tried by a military judge sitting as a general court-martial and represented by both detailed military counsel and civilian defense counsel. SPC Barker was sentenced to reduction to the grade of E1, forfeiture of all pay and allowances, confinement for life without the possibility of parole, and a dishonorable discharge. On 27 October 2009, pursuant to the terms of the pretrial agreement, the convening authority reduced the period of confinement to 90 years. SPC Barker was credited with 131 days of pretrial confinement. The U.S. Army Court of Criminal Appeals affirmed the findings and sentence on 15 December 2010. On 8 February 2011, the U.S. Court of Appeals for the Armed Forces denied the petition for review of the decision of the U.S. Army Court of Criminal Appeals. On 13 April 2010, SPC Barker requested clemency, however, no clemency was granted. He is next eligible to request clemency on 16 November 2016 and is first eligible to seek parole on 7 July 2016.

SGT Cortez was charged with conspiracy to commit murder, conspiracy to commit rape, conspiracy to obstruct justice, violating a lawful general order, premeditated murder, rape, arson, house breaking, and obstruction of justice. The case was referred capital. Between 20 and 22 February 2007, SGT Cortez pleaded guilty at his general court-martial pursuant to a pretrial agreement in order to avoid the possibility of the government seeking the death penalty. SGT Cortez was tried by a military judge sitting alone as a general court-martial at Fort Campbell, Kentucky and represented by both detailed military counsel and civilian defense counsel. He was sentenced to reduction to the grade of E1, forfeiture of all pay and allowances, confinement for life without the possibility of parole, and a dishonorable discharge. On 15 January 2008, pursuant to the terms of the pretrial agreement, the convening authority reduced the period of confinement to 100 years. SGT Cortez received 229 days of confinement credit.

The U.S. Army Court of Criminal Appeals affirmed the findings and sentence on 25 August 2008. On 15 January 2009, the U.S. Court of Appeals for the Armed Forces affirmed the decision of the U.S. Army Court of Criminal Appeals. On 22 April 2008, SGT Cortez requested clemency, however, no clemency was granted. He is next eligible to request clemency on 22 February 2017 and is first eligible to seek parole on 7 July 2016.

On 4 August 2007, a military judge sitting as a general court-martial convicted PFC Spielman, pursuant to his pleas, of conspiracy to obstruct justice, violation of a lawful general order, wrongfully endeavoring to impede an investigation (two specifications), arson, and wrongful touching of a corpse. He was represented by detailed military counsel and civilian defense counsel. An enlisted panel convicted PFC Spielman, contrary to his pleas, of conspiracy to commit rape, felony murder (four specifications), unpremeditated murder, negligent homicide (two specifications), rape, and housebreaking with intent to commit rape. After findings on the contested charges, and upon motion of the trial counsel, the military judge dismissed the arson charge and its specification because it was based upon the same act that served as the basis of one of the specifications of conspiracy to obstruct justice of which PFC Spielman ultimately was convicted. After findings, and upon motion by the trial counsel, the military judge found the rape charge and its specification to be a lesser-included offense of the felony murder specifications and dismissed the rape charge and its specification.

PFC Spielman originally was charged with both four specifications of premeditated murder and felony murder. Although the panel ultimately acquitted him of the four premeditated murder specifications, the panel found him guilty of the negligent homicides of the mother and the six-year-old daughter, and the unpremeditated murder of the fourteen-year old older daughter as lesser-included offenses of premeditated murder in addition to the four specifications of felony murder.

After the findings were announced, the military judge found the two specifications of negligent homicide and the specification of unpremeditated murder to be fairly embraced within the felony murder specifications and dismissed them. In light of the holding in *United States v. Girouard, 70 M.J. 5, 9 (C.A.A.F. 2011)*, negligent homicide is not a lesser-included offense of premeditated murder. Accordingly, the findings of guilty as to the negligent homicides of the mother and the six-year-old daughter were a nullity. PFC Spielman was sentenced to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to Private E1. The panel included a recommendation that the convening authority approve a sentence less severe than that approved for appellant's coconspirators. Even though there was a pretrial agreement which required the case be re-referred as noncapital and capped the period of confinement to one hundred and ten (110), on 18 June 2008, the convening authority reduced the period of confinement to 90 years. The convening authority also credited appellant with 656 days of confinement credit against the sentence to confinement.

On 28 June 2011, the U.S. Army Court of Criminal Appeals affirmed the findings and sentence. On 20 October 2011, the U.S. Court of Appeals for the Armed Forces vacated the decision of the U.S. Army Court of Criminal Appeals and the record of trial was returned to The Judge Advocate General of the Army for remand to that court for consideration in light of *United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)*(failure to allege the terminal element of a charged Article 134, UCMJ, offense). The U.S. Army Court of Criminal Appeals again affirmed the findings and sentence on 13 December 2011. Finally, on 27 March 2012, the U.S. Court of Appeals for the Armed Forces denied the petition for review of the subsequent decision of the U.S. Army Court of Criminal Appeals. On 6 November 2008, PFC Spielman requested clemency, however, no clemency was granted. He is next eligible to request clemency on 4 April 2017 and is first eligible to request parole on 16 October 2015.

On 21 March 2007, PFC Howard was tried at Fort Campbell, Kentucky, by a general court-martial for conspiracy to obstruct justice and being an accessory after the fact. The court-martial was composed of a military judge sitting alone. He pleaded guilty pursuant to a pretrial agreement and was sentenced to 27 months confinement, reduction to the grade of E1, and a dishonorable discharge. On 11 October 2007, the convening authority approved adjudged sentence. PFC Howard received 112 days confinement credit. On 31 July 2009, the U.S. Army Court of Criminal Appeals affirmed the findings and sentence in PFC Howard's case. A petition for review to the U.S. Court of Appeals for the Armed Forces was not filed in this case. PFC Howard was eligible to seek clemency on 28 June 2007; however, no clemency was sought. He was eligible for parole on 28 August 2007, but he was released from confinement on 16 October 2009.

Initially, SGT Yribe was charged with interfering with the investigation, dereliction of duty, and making a false statement. He negotiated an administrative discharge in lieu of court-martial, pursuant to Chapter 10, Army Regulation 635-200, in exchange for his testimony against the former PFC Green in federal court. Following the findings and sentence in the former PFC Green's trial, SGT Yribe's discharge was executed and he was automatically reduced to the grade of E1 and he received an Other than Honorable discharge after all charges against him were dismissed. SGT Yribe has been discharged from the U.S. Army and he is not eligible for relief from the U.S. Army Clemency and Parole Board, but may still seek relief from either the U.S. Army Discharge Review Board or the U.S. Army Board for the Correction of Military Record.

The U.S. Army had no jurisdiction under Article 2 of the UCMJ to court-martial the former PFC Green because he was no longer a Soldier at the time when his crimes were discovered. Additionally, the Department of Justice could not try him under the general federal criminal statutes which did not extend to his conduct overseas. Following extensive coordination between the Staff Judge Advocate, 101st Airborne Division (Air Assault) and both the U.S. Attorney for Kentucky and the Deputy Attorney General, the U.S. Attorney charged him under

the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) for his role in the crimes committed against the Al-Janabi family. The Office of the Staff Judge Advocate at Fort Campbell made two judge advocates available to assist the U.S. Attorney's office in the prosecution of the former PFC Green. Both judge advocates were sworn as Special Assistant United States Attorneys and actively participated in the grand jury process.

On 2 November 2006, a federal grand jury returned an indictment against the former PFC Green charging him with sixteen crimes: conspiracy to commit murder (Count 1), conspiracy to commit aggravated sexual abuse (Count 2), four counts of premeditated murder (Counts 3-6), four counts of felony murder (Counts 7-10), aggravated sexual abuse (Count 11), aggravated sexual abuse of a child (Count 12), and four counts of using a firearm during and in relation to a crime of violence (Counts 13-16). In addition, Count 17 charged the former PFC Green with obstruction of justice under *18 U.S.C. § 1512(c)(1) (2006)*. The indictment included a notice of special findings as to Counts 3-10 and 13-16 which, if proven, would have rendered the former PFC Green eligible for the death penalty. The United States later gave notice of its intention to seek the death penalty. Because of this, the former PFC Green could not plead guilty to the charged offenses but had to be tried at a contested trial.

In a letter dated 15 February 2007, the former PFC Green volunteered to reenlist in the U.S. Army in order to subject himself to the military justice system and allow that he be tried by the U.S. Army instead of by the Department of Justice. The U.S. Army declined his offer/request. On 15 February 2008, the former PFC Green filed two motions to dismiss claiming: (1) the district court lacked jurisdiction over him because he never ceased to be subject to military prosecution under UCMJ, as required by MEJA; and (2) MEJA violates the separation-of-powers principle, the non-delegation doctrine, and the Due Process Clause of the Fifth Amendment. The district court denied both motions. The jury heard evidence in the guilt-innocence phase of the trial from 27 April 2009 to 7 May 2009. The government dismissed Count 12 (aggravated sexual abuse of a

child) before the case was submitted to the jury. On 7 May 2009, the jury convicted the former PFC Green on all remaining sixteen remaining counts. While the U.S. Attorney's office and the Office of the Staff Judge Advocate at Fort Campbell continued extensive coordination with each other, the two judge advocates sworn as SAUSAs did not participate in the actual trial of the former PFC Green. The coordination dealt primarily with witness issues surrounding the availability to the former PFC Green's co-conspirators and the Trial Defense Counsel who represented them.

The parties presented sentencing phase evidence from 11 May 2009 to 20 May 2009. The jury was unable to reach a unanimous decision on whether the former PFC Green should be sentenced to death, therefore death was no longer a possible punishment in his case. On 4 September 2009, the district court sentenced the former PFC Green to life in prison on Counts 1 and 3-11, five years imprisonment on Count 2, and twenty years imprisonment on Count 17, all to run concurrently. The district court also sentenced the former PFC Green to life sentences on Counts 13-16, to run consecutively to each other and to the sentences imposed on all other counts. Thus, the district court sentenced the former PFC Green to a total of five consecutive life sentences. Given that parole in the federal system has been effectively abolished, the former PFC Green will never be eligible for parole. No information is currently available as to clemency for the former PFC Green.

The former PFC Green appealed the district court's findings and sentence to the U.S. Court of Appeals for the Sixth Circuit and alleged a jurisdictional defect which would preclude his prosecution under MEJA in that he alleged his discharge from the Army was never completed and alleging an Equal Protection violation given that his co-conspirators were eligible for parole in only ten years under the military system after being convicted for the same criminal actions. The appellate court affirmed the district court's findings and sentence. In the Sixth Circuit's opinion, the judge who authored the opinion specifically criticized both the former PFC Green's supervisory noncommissioned officers and

commissioned officers for their "leadership failure" which contributed, in part, to these offenses. *See United States v. Steven D. Green*, 654 F.3d 637, 646 (6th Cir. 2011). In a two sentence concurring opinion, another circuit court judge specifically wrote that he felt he was in no position to criticize the Army leadership practices. *Id*. at 654 (concurring). The former PFC Green petitioned the Supreme Court of the United States for a writ of certiorari, which was denied.

On 18 August 2006, a $30,000 Foreign Claims Act payment was made to the custodian of the two surviving sons of Kassem Hamza Rachid Al-Janabi and his wife, Fakhriya Taha Mohsine Al-Janabi, who were not present in the home at the time the other family members were killed.

Appendix VI. Separate Statement of Board Member Eugene Fidell

I agree with a great deal of the report, but would like to comment on three of the matters where my views and those of the subcommittee diverge in either emphasis or substance.

First, the report recommends review of the current law governing direct review of courts-martial by the Supreme Court of the United States. I would go further and squarely recommend placing military personnel on an equal footing with other criminal defendants.

Every person convicted in federal and state courts and every person convicted by a military commission has the right to apply for a writ of certiorari. In contrast, only if the United States Court of Appeals for the Armed Forces (CAAF) grants discretionary review or an extraordinary writ does a court-martial become eligible for certiorari. Because it grants review or an extraordinary writ in only a fraction of the cases brought to it, and because yet other courts-martial never even qualify for CAAF review because they do not meet the threshold for review by the Service courts of criminal appeals, most military accused do not in fact enjoy access to the Nation's highest court on direct review. This is fundamentally wrong.

To make matters worse, the Solicitor General has repeatedly taken the position – indefensibly in my opinion – that even if CAAF has granted review of a case, the Supreme Court's certiorari jurisdiction extends only to the precise issues CAAF identified in its order granting review.

The justifications that have been offered for this discrimination against military personnel are without merit. Obviously, the Supreme Court grants very few certiorari petitions, and it is notoriously difficult to obtain such a grant in a military case. But military personnel should have as much right to *try* as do bank robbers, civilian murderers, and, as the report notes, the accused 9/11

perpetrators. Equally obviously, there is some cost to the taxpayers in providing free appellate defense counsel to prepare such petitions. But our Nation does not ration justice. If a case is frivolous – not simply a long shot, but *frivolous* – appellate defense counsel will have every right, and indeed, a professional duty, to decline the matter, in which case the accused can choose to go it alone. But the accused should have that right, just like every other criminal defendant in the country. Finally, access to the district courts for writs of habeas corpus is no substitute for direct review: the hurdles that have been placed in the path of habeas petitioners are onerous. KSM will face no such hurdles.

Legislation to permit military accused equal access to the Supreme Court is the fair thing. This change is long overdue, and the board should say so.

Second, the report strongly embraces the commander's current power to decide which cases should be tried by court-martial, despite the divergent practice of other democratic nations that have moved the referral power to legally trained directors of military or service prosecutions. I would urge Congress to conduct a thorough examination of the question. The following comments identify the referral standards and address points that surfaced in the course of the subcommittee's and board's proceedings.

1. The *Manual for Courts-Martial* (2012 ed.) provides the following guidance with respect to the initial disposition of charges:

> The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

> In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:
>
> (A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
>
> (B) when applicable, the views of the victim as to disposition;
>
> (C) existence of jurisdiction over the accused and the offense;
>
> (D) availability and admissibility of evidence;
>
> (E) the willingness of the victim or others to testify;
>
> (F) cooperation of the accused in the apprehension or conviction of others;
>
> (G) possible improper motives or biases of the person(s) making the allegation(s);
>
> (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
>
> (I) appropriateness of the authorized punishment to the particular accused or offense;
>
> (J) the character and military service of the accused; and
>
> (K) other likely issues.

R.C.M. 306(b) (Discussion), MCM at II-25. These factors can be applied intelligently by a prosecutor. "[R]ecommendations made by subordinate commanders" are among the matters currently taken into account and a reformed, non-command-centric, referral process that relied instead on an independent director of military or service prosecutions could equally well – and indeed, should – take into account the recommendations of higher commanders.

2. Among the democratic countries that have moved the power to refer military cases for trial to a legally trained head prosecutor are the United Kingdom, Ireland, Canada, Australia, New Zealand, South Africa, and Israel. Others such as the Netherlands have followed similar paths, although the details

vary. It is my understanding that commanders in at least some of these countries retain the power to impose summary punishment roughly comparable to our non-judicial punishment (NJP), although in some there may also be oversight by uniformed legal personnel, civilian attorneys general or their equivalent, and in the Israeli case, by the courts. Some have moved to a director of military or service prosecutions model in response to decisions of the European Court of Human Rights. Most of the countries noted, however, are not in Europe and of course are not parties to the European Convention on Human Rights. Nor is this a matter as to which it is "too soon to tell." Most of the countries that have moved to a director of military or service prosecutions model have had sufficient experience to form a judgment as to whether good order and discipline have been degraded by the shift. Only recently, the Army's *Military Law Review* included a lecture by a British major general (and lawyer) who described his country's current arrangements. Nothing Major General Conway said to his Charlottesville audience suggested that good order and discipline had in any sense suffered as a result of the reforms instituted in our mother country – a nation to which American military justice is so deeply indebted.

3. That the American military establishment is larger and more complex than those of the countries that have moved from a command-centric model to a director of military or service prosecutions model is of no moment, since all of them maintain modern, effective fighting forces and are committed to and rely on good order and discipline.

4. Both substance and appearance are integral to public confidence in the administration of military justice, which is in turn integral to the success of our current all-volunteer military personnel policy. Vesting the referral power in a director of military or service prosecutions would foster uniformity in disposition decisions not only from case to case, but from command to command. Doing so would also allay concerns that commanders may decline to refer cases for inappropriate reasons. This is a current concern in the area of sexual assault as well as potential war crimes and other offenses involving host state civilians. (A

recent case has provoked consternation about the other end of the trial process: the convening authority's unbridled discretion to set aside findings of guilt. The referral and action powers, Arts. 34, 60, UCMJ, are two sides of the same coin and Congress should examine them together.)

5. Claims that commanders must for practical or legal reasons have control over the decision as to which cases are sent to trial have not persuaded me.

a. There is no reason to believe any of the commanders from whom the subcommittee heard were familiar with the alternative legal structure to which the UK and other allies have shifted. Hence, comparative judgments were precluded (or, to the extent they were made by implication, are not only untested but untestable). It was suggested that in one country, Poland, deployed troops may simply opt out of operations. This is irrelevant because, if there were an opt-out, it would apply whether the referral power were exercised by a commander or by a director of military prosecutions. Poland has a functioning military justice system. In any event, I have been unable to confirm that deployed Polish military personnel may opt out of either service or compliance with lawful orders. It was also suggested that some other unidentified country that has transferred the referral power to a director of military or service prosecutions has suffered a decline in good order and discipline. In the absence of specifics, it is impossible to comment. Similarly, reference was made to "caveats" that are said to degrade some sending states' commanders' ability to ensure good order and discipline, but no details were provided, apparently because of classification concerns. The "caveats" argument cannot be evaluated without the requisite information.

b. Experience teaches that effective command does not need to be tied to the referral power. After all, commanders other than operational commanders – *i.e.*, those officers with administrative control – have for years been responsible for discipline, as provided in Joint Publication 1. Similarly, the common practice has been for disciplinary decisions to be made not by a joint commander, but by

the offender's commander in his or her own service. What is more, there is a strong body of opinion within the services, expressed especially by the Marine Corps' representative, that courts-martial are typically best conducted in garrison. In other words, the services' actual practices overwhelmingly refute any claim that control over the decision to send a case to trial must be made by the commander if good order and discipline are to be preserved.

c. Prof. Victor M. Hansen has cautioned about the command responsibility implications of transferring the referral power to a director of military or service prosecutions. If a country has a credible, honest and functioning military justice system, however, it is inconceivable that we would be creating the slightest *Yamashita* exposure if commanders were required to rely on such a system. Our democratic allies who have made this transition have not created any new exposure for their commanders; these countries' commitment to strict observance of the Law of Armed Conflict and the principle of command responsibility is unquestioned. That said, I agree that Congress should carefully examine this and any other direct or indirect consequences of the transition whose consideration I recommend.

6. It was suggested that Congress has rejected the idea of transferring the referral power to a director of military prosecutions. The so-called "STOP Act" (H.R. 3435) included such a provision, but only for sexual assault cases. Creating such an office for a single type of offense makes no sense, and it is not surprising that it failed to gain traction. The episode cannot plausibly be viewed as congressional rejection of the broader and more logical reform to which these remarks are addressed. Earlier proposals came over 40 years ago when Sen. Birch Bayh and other members of the House and Senate introduced a variety of measures that would have reformed the referral process. Plainly a great deal has happened since then, and it would be wrong to read their fate as any indication of what a current Congress would or, more importantly, should do concerning this important issue. The broad public and congressional dismay over the post-trial action in *United States v. Wilkerson* confirms that the institutional issues raised

by the current command-centric architecture are not confined to any particular type of case or venue.

Third, while I believe the services should have a uniform standard of proof for the imposition of NJP, I do not believe that standard should be merely a preponderance of the evidence. So far as the record shows, the United States Army has operated perfectly well using the stricter proof-beyond-a-reasonable-doubt standard. To be sure, NJP is not a criminal proceeding, but it is joined at the hip with courts-martial that clearly *are* criminal in nature. Absent evidence either that superior officers were routinely granting NJP appeals on the basis that the evidence did not satisfy the reasonable doubt standard, or that the Army Board for Correction of Military Records or federal courts were regularly setting NJPs aside on that basis, I would afford all of our men and women in uniform the benefit of the *higher* standard, especially given the significant adverse consequences that flow from NJP in the present personnel environment. In sum, I would set the bar high for all services, not lower it for Soldiers.

Appendix VII. Public Comments

The Board complied with the Federal Advisory Committee Act (FACA) and allowed for public comments at each Board session. These highlights were derived from those comments, but due to the Board's limited charter, we are unable to address and consider each issue raised by members of the public. Similarly, although several of these witnesses addressed specific cases, the Board did not pass judgment on the results of military justice in particular cases or comment on any pending cases.

Individual comments received are summarized below. Several themes emerged that warrant specific mention:

- The Subcommittee was told that some military courts have been unwilling to admit evidence of command complicity or failure of commanders and other leaders to ameliorate the corrosive effects on individual Service members' values produced by sustained conflict, particularly in a COIN environment.
- The Subcommittee was told that prosecutorial decisions are made to charge "conspiracy" offenses for battlefield actions that may make an accused potentially criminally liable for the actions of a member of a small unit although the accused did not participate in the misconduct.
- The Subcommittee was told that the inadmissibility of evidence of command complicity and climate and the use of conspiracy charges, combined with the mandatory life sentence for premeditated murder and the possibility of lengthy pretrial confinement in austere conditions, can make an accused unwilling to risk litigation even though he believed himself not guilty.

The following individuals elected to make statements before the Board:

- Ms. Francis Thexton
- Mr. Craig Myers
- Mrs. Renee Myers
- Mr. Daniel Crowe
- Major Herbert Donahue, Jr., United States Marine Corps (Ret.)
- Ms. Vicki Behenna
- Mr. Scott Behenna

Each of these individuals provided thoughtful and insightful commentary to the Board. As such, we provide a summary of the statements provided by these individuals to memorialize their concerns and commentaries.

Ms. Francis Thexton[190]

Ms. Thexton is the mother of Specialist William Hunsaker, USA, who pled guilty in a 2007 general court-martial to killing three Iraqi detainees. She provided comments to the Board on two separate occasions. In her first appearance, she discussed her son's case and her perceptions of "injustices" as they relate to what UCMJ reforms she believes are necessary to support troops in a deployed environment. She noted her concerns about a lack of leadership responsibility in her son's case and the disparity in sentencing in cases like similar to her son's. She stated that all four Soldiers involved in her son's case were charged similarly, but received dissimilar sentences ranging from eight months to 18 years.

Ms. Thexton also spoke of her belief that consideration of the combat environment should be a factor in addressing allegations of misconduct involving

[190] Ms. Thexton appeared before the Board on 7 November 2012 and 22 January 2013. A complete transcript of her comments can be found on pages 348 to 361 of the 7 November 2012 Board Transcript and pages 348-363 of the 22 January 2013 Board Transcript.

civilian casualties. She expressed the difficulty of serving in Iraq at that time and noted that both at the Article 32 level and at the court-martial level, the context of the combat environment specifically the difficulty of implementing a COIN mission in a combat zone, should be considered. Ms. Thexton spoke about perceived deficiencies in the criminal investigation conducted in a combat zone, and the difficulty preserving evidence which may have supported her son's position.

Ms. Thexton also posited that the conduct of military investigators and prosecutors should be closely examined. She states that that Army investigators "mislead" and "coerced" witnesses in her son's case. Similarly, also argued the military prosecutors did not share information with the defense.

Ms. Thexton concluded her first public statement by addressing pretrial confinement. She asserted that in her son's case, the conditions of pretrial confinement were inappropriate and should be examined.

In Ms. Thexton's second appearance before the Board, she requested the Board to consider the impact of courts-martial on the accused Service member's family. She asserted that she had difficulty receiving information and the system lacks services for family members of Service members accused of misconduct. Ms. Thexton recommended not trying cases in theater to lessen the burden on the family, and make it easier for family to attend the trial and provide support to the accused Service member.

Lastly, Ms. Thexton drew the Board's attention to turnover of convening authorities. She highlighted in her son's case, there were four separate convening authorities. She submitted that she believed he may have had better opportunity for clemency if there had been one convening authority throughout.

Mr. Craig Myers and Ms. Renee Myers[191]

Mr. and Mrs. Myers addressed the Board jointly as the stepfather and mother of SGT Derrick Miller, USA. In a 2011 general court-martial, Sergeant Miller was found guilty of the premeditated murder of a suspected Afghan insurgent and was sentenced to life in confinement, with the possibility of parole.

Mrs. Myers criticized the investigatory process. She submitted that in her son's case there was no crime scene investigation, little forensic evidence and no examination of the body - only testimonial evidence.

Mrs. Myers stated that there are inconsistencies in the sentences of soldiers convicted of cases of civilian casualties. She noted that Mrs. Myers discussed the importance that should be given to the impact that serving in a combat environment has on a Service member accused of misconduct in the deployed environment. She argued that these offenses must be viewed in the stressful and difficult context in which they happened. Mrs. Myers lastly asked the Board to review the clemency process, believing that her son did not receive a fair clemency hearing from the convening authority.

Mr. Myers echoed his wife's sentiments. He emphasized that stress on Service members under combat conditions should be a factor considered in the process. He also stated that cases often rest on little forensic evidence and instead rely on testimony from Service members who have been provided immunity by the government or have been coerced by military investigators.

Mr. Daniel Crowe and Major Herbert Donahue, Jr., USMC (Ret.)[192]

Mr. Crowe and Major Donahue appeared together before the Board. Major Donahue is the founder and director of United American Patriots. Mr.

[191] Mr. and Mrs. Myers appeared before the Board on 15 February 2013. A complete transcript of their testimony can be found on pages 369 to 384 of the 15 February 2013 Board Transcript.
[192] Mr. Crowe and Major Donahue appeared before the Board on 15 February 2013. A complete transcript of their testimony can be found on pages 384-442 of the 15 February 2013 Board Transcript.

Crowe sits on the board of United American Patriots and also serves as the director of The Innocent Warrior Project.

Mr. Crowe asked the Board to consider substantial revisions to the UCMJ in cases involving civilian casualties in the deployed environment. He primarily argued that the current defense legal system is neither adequate or objective enough to represent Service members. Mr. Crowe noted that the judge advocate responsible for supervising all military defense counsels is selected and rated by the Service Judge Advocate General. To advance professionally, Mr. Crowe argues, defense counsels and their senior leadership need to be responsive to the Service's Judge Advocate General, which poses an inherent conflict in adequately representing the Service member.

Instead, Mr. Crowe advocated for an independent, joint-Service, legal defense organization that would reside within the Department of Defense. He posited that these attorneys would not be beholden to any Service Judge Advocate General and would, therefore, be able to more effectively represent Service members accused of misconduct.

Major Donahue expressed concern about the treatment of Service members accused of misconduct in the deployed environment. He argued that they are unfairly treated and instead of being treated as Service members who have served in combat, they are treated like criminals. He also expressed concern about the adequacy of the legal defense they are receive from assigned military counsel. Major Donahue posited that military defense counsels are too inexperienced, not independent, and not adequately funded, especially when compared to prosecution funding. Furthermore, he noted the disparate sentences Service members receive upon conviction of offenses involving death in a deployed environment. Major Donahue expressed concern about the need to consider combat stress in these cases. He emphasized Service member rights must be observed at all times and a fair and adequate defense must be provided.

Ms. Vicki Behenna and Mr. Scott Behenna[193]

Ms. Behenna and Mr. Behenna appeared together before the Board. They are the parents of First Lieutenant Michael Behenna, USA, who was convicted in a 2009 general court-martial of killing a suspected Iraqi insurgent. Ms. Behenna is an Assistant United States Attorney, Western District of Oklahoma, and Mr. Behenna is a retired state criminal investigator.

Ms. Behenna expressed concern to the Board about the mandatory life sentence for premeditated murder. She argued that Service members who are accused of committed civilian casualties are often charged with premeditated murder without concern for the specifics of the case or whether evidence supports the charge. Consequently, prosecutors begin negotiating from a position of strength and can coerce guilty pleas to carry the weight of a mandatory life sentence over an accused Service member's head. Furthermore, the mandatory sentence for premeditated murder does not adequately consider the environment in which these offenses are committed. She argued that young Service members, executing an extremely difficult COIN mission, are surrounded by stress, fear, and death. As such, Ms. Behenna advocated that combat environment and other factors should be considered in assessing an appropriate sentence for these Service members and that a mandatory life sentence impedes such consideration.

Ms. Behenna also asked the Board to examine the experience level of military prosecutors. She argued that in her son's case, discovery issues and other factors led her to believe that the prosecutors were not properly trained to try difficult cases, and as a result, her son's ability to receive a fair trial was impeded.

Likewise, Ms. Behenna discussed the inadequacy of the deployed investigative process. She argued that no forensic evidence existed to support

[193] Mr. and Ms. Behenna appeared before the Board on 22 January 2013. A complete transcript of their testimony can be found on pages 305-347 of 22 January 2013 Board Transcript.

her son's conviction and that the lack of evidence was due, in part, to the difficulty deployed investigators have securing a crime scene.

Furthermore, Ms. Behenna asked that the Board not limit Service member's Article 32 rights.

Mr. Behenna focused his remarks on the investigative process. He stated that based on his experience, investigators do not have the expertise or services necessary to investigate premeditated homicide cases. Similarly, he posited that his son acted in "self defense" and that both the UCMJ and rules of engagement must give a Service member the right to act in self defense should he or she be threatened.

In addition to the individuals that elected to personally appear before the Board, several individuals elected to submit written matters vice making a personal appearance. The following individuals submitted written matters:

- Ms. Katherine S. Miller, wife of SGT Derrick Miller.
- Lt Col (Ret.) D.G. Bolgiano, former member of the U.S. Air Force Judge Advocate General Corps.
- Mr. Geoffrey Nathan, attorney-at-law.
- COL Edward P. Horvath, USAR

All written materials received from the public are available for inspection or copying. For more information, please contact the DLPB staff director at staffdirectordefenselegalpolicyboard@osd.mil.

Appendix VIII. Comments from Military Departments

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC 20330

20 MAY 2013

MEMORANDUM FOR DEFENSE LEGAL POLICY BOARD

FROM: HQ USAF/JA
1420 Air Force Pentagon
Washington, DC 20330-1420

SUBJECT: Comments on Draft Report of Subcommittee to the Defense Legal Policy Board

I am responding on behalf of the Secretary of the Air Force. Thank you for the opportunity to provide comments on the DLPB Subcommittee's draft report. I am pleased to assist the DLPB in reviewing and assessing military justice in cases of U.S. Service members alleged to have caused the death, injury, or abuse of non-combatants in Iraq and Afghanistan.

I applaud the efforts of the Subcommittee. The periodic review of the way in which we administer military justice and considerations of reform is essential in maintaining a fair and efficient military justice system. This need for periodic review is especially important in the deployed environment where a single act of misconduct by one of our Service members has the potential to undermine our national purpose in the use of military force. If military leadership fails to adequately address each and every incident, or appears complacent in doing so, we fail to publicly demonstrate our commitment to the Rule of Law and, thus, undermine our national purpose.

I welcome the opportunity to comment on the Subcommittee's draft report. I would like to focus my comments on three areas: the role of the convening authority in addressing allegations of misconduct in the deployed environment; the application of military justice in the increasingly joint environment; and whether the UCMJ should be amended to improve the way in which cases involving multiple defendants are handled.

The Role of the Convening Authority

The essential role of the commander in holding Service members accountable for crimes committed both in garrison and in a combat theater cannot be overemphasized. The UCMJ has proven through decades to be supremely capable of maintaining good order and discipline among our fighting forces. Key to the UCMJ's success has been the authority of the commander over disposition decisions regarding Service members' misconduct. Discipline is an important element of command and control. Discipline ties the best people, the best training, and the best equipment together into a formidable military force. The commander's authority to discipline Service members for infractions, both in garrison and on the battlefield, is critical to attaining mission success. Furthermore, optics matter when creating a sense of accountability and in enhancing good order and discipline. The value of discipline is significantly increased when

military members witness their commander holding other members of their command accountable.

Military Justice in the Joint Environment

Historically and presently, there is a strong preference for returning members to their respective Service component to ensure that Service specific issues are properly understood by the convening authority, the legal advisors, and the accused Service member's military defense counsel. I acknowledge that the often seamless nature of our modern joint war-fighting effort may require the joint force commander or combatant commander to control these processes. However, I want to emphasize the importance of the Service component commander in administering military justice and that Service component commanders remain best situated to exercise discipline over their Service members.

In cases where a combatant commander convenes a court-martial of a Service member from a different Service, it should be accompanied by a requirement that the joint commander consult the accused Service member's convening authority before determining which concurrent convening authority should exercise the disposition decision. Furthermore, the grant of convening authority to a joint commander should also state a preference for the Service member's convening authority to convene the court-martial, recognizing that resources to conduct such trials and satisfy pretrial and post-trial actions are most often available in the Service convening authority's SJA's office. Following this approach guarantees unity of command for the joint commander while assuring that resources are available to satisfy the requirements specified in the UCMJ and in the Manual for Courts-Martial.

Improving the Ability to Try Multiple Defendants Together

It is not necessary to revise the military justice systems to accommodate trials of multiple defendants. While we can accommodate joint trials, they are often impractical due to the accused Service member's individual right of forum choice.

Any recommended reform should not come at the expense of a Service member's procedural and substantive due process rights. The UCMJ affords each Service member the right to choose trial by either a judge alone or a panel of officers. Additionally, if the accused is enlisted, he or she may choose to have at least one-third of the panel members be enlisted. In no case, however, can the accused Service member outrank any member on the panel. Since the accused Service member has an absolute right to his or her forum selection, joint trials threaten to compromise each accused Service member's right to forum selection. I acknowledge that in a case with multiple defendants where they each elect a different forum, the military judge may accommodate by empanelling more than one panel, where different panels hear the case for each accused Service member. However, this option is impractical in the deployed environment where allocating a large number of personnel to a court-martial may negatively impact the mission. While there are benefits to trying multiple defendants together, these benefits do not outweigh the rights of our accused Service members.

Thank you for the opportunity to provide comments on the Subcommittee's report. The past eleven years of continued conflict have tested our Services, our Service members, and the UCMJ. Despite the stress placed upon it, the UCMJ has admirably served the interests of commanders, accused Service members, and victims alike. To capture this success for future conflicts, we must ensure that the convening authority remains the center of the military justice system and that any effort to reform continues to consider the rights of accused Service members.

RICHARD C. HARDING
Lieutenant General, USAF
The Judge Advocate General

CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, D.C. 20318-9999

21 May 2013

The Honorable Judith A. Miller
Co-Chair, Defense Legal Policy Board Subcommittee
Defense Legal Policy Board
One Liberty Center
875 North Randolph Street, Post Office Box 3656
Arlington, VA 22203

Dear Ms. Miller:

Thank you for forwarding the draft report of the Defense Legal Policy Board (DLPB) Subcommittee's review and assessment of military justice cases of U.S. Service members alleged to have caused the death, injury, or abuse of noncombatants in Iraq or Afghanistan. I share former Secretary Panetta's sentiment in the Subcommittee appointment memorandum that "for offenses that take place in a country in which we operate alongside the civilian population, it is critical that our system of military justice be efficient, fair, dependable, and credible." I am confident that the Subcommittee's review, and ultimately the DLPB's own advice and recommendations to Secretary Hagel, will help accomplish this goal.

I solicited comments on your draft report from my staff and the Combatant Commands. Their comments are enclosed for your consideration. Please note the review was not limited to "legal offices" as comments also touch upon personnel, reporting, operational matters, doctrine, and training.

I am particularly encouraged by the Subcommittee's endorsement of commanders as integral to the military justice system. Given the ongoing dialogue in Washington, the Subcommittee's finding that "the role of commanders as convening authorities [is] indispensable to a fair and effective system of justice for armed forces" is especially timely and relevant.

Thank you for considering the enclosed comments as you continue your study and analysis of these important issues. My point of contact is Brigadier General Richard C. Gross, U.S. Army, Legal Counsel to the Chairman of the Joint Chiefs of Staff, at 703-697-1137.

Sincerely,

MARTIN E. DEMPSEY
General, U.S. Army

Enclosure:
As stated

ENCLOSURE

JOINT STAFF AND COMBATANT COMMAND COMMENTS ON SUBCOMMITTEE DRAFT REPORT OF 26 MAY 2013, "DEFENSE LEGAL POLICY BOARD REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES"

Doctrine

- If changes in doctrine are to be considered, concurrent changes in joint force resourcing must also be considered.

- Recommend changing "The Subcommittee recommends that whenever possible, especially in COIN operations, doctrine and deliberate planning should require notice of civilian casualties to senior operational commanders immediately or as circumstances permit, in a manner prescribed by the senior joint force commander" to "The Subcommittee recommends that departmental policy should require notice of civilian casualties to senior operational commanders immediately or as circumstances permit, in a manner prescribed by the senior joint force commander." Neither doctrine nor deliberate planning is compulsory. The first is a point of departure; it is sanctioned theory. The second is a process. The recommendation to notify operational commanders as soon as possible should be codified in DoD policy to compel compliance (page 9, lines 8-12; the same recommendation also applies to lines 28-29 of page 9 and lines 13-14 and 23-24 on page 28).

- The report defines joint doctrine as DoD regulations and instructions; Chairman of the Joint Chiefs of Staff publications and instructions; *and* Service regulations, pamphlets, *and* implementing training guidance at schools, training centers and unit-level training. This applies throughout the report where the Subcommittee recommends that joint doctrine incorporate items. As a result, the report misinterprets doctrine with policy. Policy can direct, assign, task, prescribe desired capabilities, and provide guidance for ensuring the Armed Forces are prepared to perform their assigned roles. Conversely, doctrine enhances the operational effectiveness of the Armed Forces by providing authoritative guidance.

- Joint Publication (JP) 1-04, "Legal Support to Military Operations," is currently in assessment, and we will consider all doctrine-related draft recommendations in the report for their impact on JP 1-04 and other relevant joint publications.

Investigations

- Given the distributed and hostile nature of combat operations, investigation by Military Criminal Investigative Organizations (MCIOs) will prove to be a significant challenge unless the MCIO investigators are collocated with or embedded in maneuver units at the tactical level.

- MCIO "command relationships," and the authority to task MCIOs, must be clearly established in a joint environment and should not be Service-dependent.

- Guidelines for MCIOs and commands should be established in order to prevent interference between different types of investigations (i.e., criminal and safety investigations) in order to

avoid negatively impacting the ability to take subsequent administrative or judicial action if necessary.

- Although after-action reports have revealed the benefit of the use of "incident assessment teams" or other holistic consequence management solutions that deploy when investigating serious civilian casualty incidents, doctrinal change capturing these solutions will be meaningless without concurrent changes in joint force resourcing and training.

- Recommend changing "Doctrine and operational planning should provide for a certified forensics capability close to the area of operations to better support criminal investigations, particularly those involving civilian casualties" to "Doctrine should recommend commanders execute a cost-benefit analysis (considering, for example, size, scope, scale of the operation, political sensitivities, and synchronized communication risks) regarding requesting a certified forensics capability close to the area of operations to better support criminal investigations, particularly those involving civilian casualties." The rationale is that while a reasonable person would advocate for swift evidence processing through certified labs, the cost of relocation, staffing, equipping, and certifying a forensics facility may not be worth the potential benefit of decreased processing time. Commanders should weigh the factors unique to their areas of responsibility (AORs) and make appropriate decisions. The current phrasing implies that lab relocation close to the AOR is the default position. It should be an option, not the default position (page 35, lines 38-14).

- Recommend clarification of the language "particularly those involving civilian casualties." Would the lab be required to give priority to civilian casualty (CIVCAS) cases over all other investigations, including blue-on-blue sexual assault? (Page 70, lines 18-21.)

Training

- Ethics and leadership training is only part of the equation to the Joint Force commander's ability to administer justice within the force. Leaders must enforce the training and provide accountability.

- All contractors entering the operational environment should receive appropriate battlefield ethics training as a term of their contract. It should be clearly established who is responsible for preparing the material and who is responsible for conducting the training.

Military Justice

- The standard of proof for Article 15, Uniform Code of Military Justice (UCMJ), is not uniform across the Services. Therefore, a review of increased uniformity in non-judicial punishment processes and standards would be appropriate.

- Any amendments to the Manual for Courts-Martial (MCM), for example, to increase the maximum punishment for dereliction of duty to ensure appropriate sanctions in civilian casualty cases, should be carefully studied to prevent unintended second- and third-order effects.

- Although this review specifically focuses on the handling of military justice cases in which U.S. military members are alleged to have unlawfully caused death or injury to civilians in combat zones, its recommendations regarding changes to the MCM/UCMJ will necessarily apply to all alleged violations of the UCMJ if the Subcommittee intends for all crimes to be subject to the same procedural and substantive standards. They should be viewed in that context, even though the Subcommittee's charge was to tailor its focus to CIVCAS (page 19, lines 10-18).

- If small unit loyalties are an inducement not to report an offense, there may be less willingness to report should the Combatant Command assume full responsibility for military justice, as the report recommends (page 23, lines 18-25).

- The recommendation to specify that military justice is the responsibility of joint force commanders at all levels (as opposed to current doctrine favoring Service Component commanders) assumes that joint force commanders will be adequately resourced to handle the future influx of military justice cases. Further, JP 1, Chapter IV, Section C, already allows the joint force commander flexibility to prescribe policies that either retain jurisdiction at the joint command level or delegate it to the Service elements (page 31, line 42, through page 32, line 8).

- For the proposal to expand UCMJ jurisdiction to include contractor personnel, the Military Extraterritorial Jurisdiction Act (MEJA) already establishes that DoD employees and contractors accompanying the Armed Forces overseas may be prosecuted for any offense punishable by imprisonment over 1 year. Not only would the proposed expansion of UCMJ jurisdiction be largely redundant with MEJA, but it could subject contractors to criminal liability for a host of uniquely military offenses unrelated to CIVCAS (page 34, lines 19-21).

- Rules for Courts-Martial (R.C.M.) 305 provides that an accused may remain in pretrial confinement only if the commander believes upon reasonable grounds that an offense triable by a court-martial has been committed; that the accused committed it; and that confinement is necessary because the accused will not appear at trial, or will engage in serious criminal misconduct; and that less severe forms of restraint are inadequate. The rule does not allow for pretrial confinement on the basis that failure to impose it can directly determine the outcome of a case (page 37, lines 29-31).

- Pretrial confinement is not intended to be easily achieved. R.C.M. 305 establishes a series of safeguards to preserve the fundamental rights of the accused. Convenience of the government is not a permissible consideration of the commander or pretrial confinement reviewing officials. Still, rule 305(m) already allows the Secretary of Defense to suspend certain protections should operational necessity so require. Recommend making maximum use of this provision in the deployed environment as necessary.

- Lines 17-21 on page 98 offer further justification to maximize the availability of pretrial confinement in the deployed environment, but again, such justification is not in accordance with R.C.M. 305.

- In support of the recommendation to increase the maximum punishment for dereliction of duty, the report finds that local populations are dissatisfied with a 6-month maximum

confinement term for this offense, and would feel a sense of justice if that maximum were increased to 1 year. There is no evidence to support this finding (page 41, line 36, through page 42, line 3).

- Court-martial members are instructed to recognize five sentencing goals: rehabilitation, punishment, protection of society from the wrongdoer, preservation of good order and discipline, and deterrence (Department of the Army Pamphlet 27-9, 1 January 2010, "Military Judges' Benchbook," page 92). Satisfying a local population inserts unnecessary risk of error into the case, and a successful appeal may backfire by adding to the local community's anger. R.C.M. 1001 provides the means to introduce sentencing evidence in aggravation, and it is therefore recommended that Trial Counsel make maximum use of this provision should it become necessary to inform the members of the strategic effects of an accused's offense.

- Another stated intention behind this recommendation is to incentivize commanders to hold military members accountable for civilian deaths, lest commanders themselves be prosecuted for dereliction of duty. Such an environment may undermine the convening authority's objectivity and potentially expose the government to claims of unlawful command influence (page 41, line 36, through page 42, line 3).

- Recommend leaving the question of trial location to the discretion of the convening authority. The report states a trial forward has the advantage of being visible to the host nation and affected community, but such visibility may not always serve the interests of justice, especially in a climate of high tensions. Concur with the statement of LtGen Mills, explaining that in-theater prosecution under the wrong circumstances can be a distraction from combat operations. As such, recommend joint and Service doctrine not specify a preference for trials forward (page 78, line 29, through page 80, line 13).

- This section advocates amending the MCM to make it more difficult for the accused to win a motion for severance under R.C.M. 906(b)(9). In particular, it recommends striking the preference for liberal treatment of motions to sever and replacing it with (1) an explanation of the advantages of a joint trial in the deployed environment and (2) guidance for joint trials even when co-accused elect different forums (page 81, line 1, through page 85, line 2).

- The Subcommittee acknowledges the abundance of uncontroverted testimony against this proposal, but subsequently asserts that the convenience of the government and the local community's desire for swift justice outweigh the due process, undue prejudice, and logistical concerns raised by six prominent witnesses, including the Secretary of the Navy. There is no evidence to rebut the concerns raised by witness testimony (page 82, line 32, through page 83, line 23).

- Assuming co-accused are tried jointly, the report asserts their due process rights can be preserved even if they select different forums. There is no evidence to support this assertion. In a trial of two co-accused, with one selecting members and the other military judge alone, the military judge is likely to adjudicate motions to suppress evidence that the members never end up seeing. As such, the accused who selected trial by military judge alone is at a disadvantage

because his finder of fact has viewed evidence or heard testimony that his co-accused will not have to answer.

- The footnote on page 84 offers that a major purpose of this recommendation is to pacify the local population in furtherance of the counterinsurgency (COIN) mission. That our due process protections are inconsistent with our in-theater strategic communication goals is not a sufficient reason to reduce the legal protections we afford our Service members. Further, the report references no evidence that curtailing the existing rights of the accused will enhance our ability to meet our COIN objectives. As such, this basis for the recommendation is unsupported.

- This section recommends amending the UCMJ and R.C.M. to permit alternatives to live testimony at trial in cases arising in a combat environment when nonmilitary witnesses refuse to provide in-person testimony, and when witnesses are not reasonably available. The report correctly cites the two-part test in *Maryland v. Craig*, 497 U.S. 836, 848 (1990), in which "denial of confrontation is necessary to further an important public policy" and "the reliability of the testimony is otherwise assured." As an example of the public policy served by its recommendation, the report cites "the need to provide a sense of justice to the local population." (Page 87, lines 14-15.) There are no findings or evidence to demonstrate how the local population's sense of justice, while important, outweighs the accused's Sixth Amendment right to confront his accuser (page 85, line 3, through page 87, line 25).

- Existing Combatant Command resources do not permit the full spectrum of military justice functions to be regularly exercised at that level (page 95, lines 14-27).

- The Service Components differ in their approaches to the Article 32 process. For example, the Army favors appointing non-Judge Advocate General (JAG) Investigating Officers (IOs), while Navy convening authorities commonly appoint JAG IOs. The former procedure requires an independent JAG officer to train the IO and act as Legal Advisor, whereas the latter does not. While both approaches have their own advantages, it would be useful to develop a consistent model for the joint environment (page 98, line 37, through page 100, line 13).

- Amendment of the MCM to authorize a convening authority to transfer convening authority functions to another convening authority's jurisdiction after a case has been referred to trial contravenes the basic functions of a convening authority, in terms of independent judgment by a convening authority regarding case disposition. It seems to attempt to address successor-in-command, transfer of jurisdiction, universal jurisdiction of General Court-Martial Convening Authorities, and situs of trial topics that are already adequately addressed in the UCMJ and RCM.

- Trials forward are preferable but often very impractical. Doctrine should account for the realities of complex and lengthy investigations and trials that can often take longer than average to complete.

- Trials involving civilian casualties in a theater of operations are already extremely complex. A preference for adding to the complexity by encouraging joint trials invites error.

- Current training for judge advocates is adequate, and the existing process of Article 32 investigations is time-tested. The thorough and impartial nature of the investigation has been a bedrock right of the accused and an effective method of discovery and trial preparation for both the accused and the government. In complex cases such as civilian casualties on the battlefield, the Article 32 process is historically not the "long pole in the tent."

THE SECRETARY OF THE NAVY
WASHINGTON DC 20350-1000

May 22, 2013

The Honorable Judith A. Miller
Major General Walter B. Huffman, USA (Ret.)
One Liberty Center
875 North Randolph Street
Arlington, VA 22203

Dear Ms. Miller and General Huffman:

Thank you for the opportunity to provide comments on the draft report of your Subcommittee, which was forwarded to my office on May 1, 2013. I appreciate the thoroughness of the report and the commitment of the Subcommittee in this important effort.

Regarding the Subcommittee's recommendation to remove from joint doctrine the default that disciplinary authority be exercised within Service channels, as stated in my December 11, 2012, letter to the Board, I believe the decision of whether the joint force commander exercises court-martial jurisdiction should be based on a case-by-case assessment.

Thank you again for the opportunity to comment upon the report. If I can be of any further assistance, please let me know.

Sincerely,

Ray Mabus

Copy to:
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Commandant of the Marine Corps
Judge Advocate General of the Navy
Staff Judge Advocate to the Commandant

U.S. Department of Homeland Security
United States Coast Guard

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MAY 2 9 2013

The Honorable Judith A. Miller
Major General Walter B. Huffman, U.S. Army, Retired
Co-Chairs, Subcommittee, Defense Legal Policy Board
One Liberty Center
875 North Randolph Street
Arlington, VA 22203

Dear Ms. Miller and General Huffman:

Thank you for your letter to the Commandant of the Coast Guard received on 1 May 2013, inviting the Coast Guard to offer comments on the draft of the Subcommittee to the Defense Legal Policy Board. I am responding on behalf of the Commandant, and the Coast Guard greatly appreciates this opportunity to review and participate in the Board's work.

The draft report reflects a tremendous amount of effort and careful thought. I strongly believe in our separate system of military justice. Our military justice system is necessitated by the worldwide deployment of our service members, the need for a system of justice responsive to underway and combat environments, and the importance of maintaining discipline in the armed forces. I also support the Subcommittee's recognition that our system of military justice is a command-centric model, which recognizes the commander's authority and responsibility for unit readiness, safety, and morale. As such, the commander's ability to seek justice rapidly, visibly, and locally is essential to maintaining unit discipline.

The conflicts in Afghanistan and Iraq have demonstrated that our system of military justice must adapt to the changing joint manner in which we conduct operations worldwide. As such, I endorse the recommendations of the Subcommittee, and support the Subcommittee's proposals to amend the system of military justice to provide joint commanders with "the tools and authority necessary to preserve good order and discipline through the military justice system."

Sincerely,

F. J. Kenney
Rear Admiral, U.S. Coast Guard
Judge Advocate General

SECRETARY OF THE ARMY
WASHINGTON

MAY 30 2013

The Honorable Judith A. Miller
Co-Chairman, Defense Legal Policy Board
One Liberty Center
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Dear Ms. Miller and Members of the Subcommittee:

Thank you for the hard work of the subcommittee of the Defense Legal Policy Board (DLPB) and for the invitation to provide comments on the subcommittee's draft report on Military Justice in Combat Zones, dated April 26, 2013.

It is imperative for the U.S. Army to critically review the actions of military units in combat in order to capture lessons to be learned and to ensure shortcomings are not repeated. The DLPB has been a great tool for the larger institution of the U.S. Armed Forces to focus on the ever-present military mission of maintaining good order and discipline in the fighting force during combat operations. The past twelve years of combat operations have illuminated critically important practices which should be preserved and institutionalized for the next fight. The report of the DLPB on Military Justice in Combat Zones provides a mechanism for such preservation.

The U.S. Army makes every effort to minimize the impact of war on innocent civilian populations. There are occasions when the military justice system must be called upon to address those rare instances where Soldiers have intentionally or negligently failed to live up to the expectations of the U.S. Army, the American people, and the international community. Military justice is a key tool for the deployed commander to address Soldier misconduct and the related impact on innocent civilians. The commander remains in the best position to receive a report of civilian casualties, conduct an initial assessment, direct and allocate the proper resources for an investigation, and quickly address failures and misconduct.

The U.S. Army does not fight its battles alone and cannot complete its missions without the integration of assets from our sister services. Likewise, the U.S. Army will provide the necessary assets to our sister services when called upon to complete the overall mission. Consequently, the joint commander, whether U.S. Army or another service, must have the ability and the tools necessary to enforce good order and discipline within his assigned area of responsibility. That joint commander must have the primary authority to address military justice issues that arise on his watch.

Combat operations in Iraq and Afghanistan have increasingly relied upon a new player on the battlefield – the civilian contractor. While a joint commander is responsible for all operations within his assigned area of responsibility, he currently does not have the ability to hold accountable contractors not affiliated with the Department of Defense. Consequently, the joint commander must have the authority to address misconduct by civilian contractors hired by any entity of the U.S. government operating within the joint commander's area of responsibility, not only Department of Defense affiliated contractors.

Preservation of the legal rights of Soldiers accused of serious misconduct is a hallmark of the military justice system throughout the world. The U.S. Army as an institution is committed to its responsibility to the American people to ensure that the legal rights of our Soldiers are not compromised merely because of geography or circumstance. At the same time, the U.S. Army recognizes the importance of keeping victims and others impacted by Soldier misconduct informed of pending military justice actions. The U.S. Army must, to the extent possible given operational security considerations, address the needs and concerns of the victims and witnesses in civilian casualty cases.

Please let me know if I can be of any further assistance to the DLPB. I look forward to reviewing the Board's report to the Secretary of Defense.

JOHN M. MCHUGH