

## Non-Deployable: The Court-Martial System in Combat from 2001 to 2009

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### I. Introduction

Conventional wisdom holds that the American court-martial system can follow the military anywhere in the world and still function effectively. A group of military law experts recently touted, “In recent years, the system created and governed by the UCMJ [Uniform Code of Military Justice] has continued to operate effectively through the increased tempo of operations and distinctive legal challenges of the ongoing wars in Iraq and Afghanistan.”<sup>1</sup> When speaking in platitudes rather than analyzing actual practice, military lawyers have also joined this refrain: “The military justice system . . . goes wherever the troops go—to provide uniform treatment regardless of locale or circumstances.”<sup>2</sup> Another group of judge advocates concluded approvingly, “During times of conflict, as always, military members deserve the highest protections. Judge Advocates (JAs) continue to work with commanders during contingency operations to exercise swift and sound justice in sometimes austere conditions.”<sup>3</sup>

Surprisingly, there have been no empirical studies examining how well the court-martial system has actually performed in America’s recent conflicts.<sup>4</sup> This paper

attempts such a study, and the findings largely contradict the conventional wisdom. After-action reports from deployed judge advocates show a nearly unanimous recognition that the full-bore application of military justice was impossible in the combat zone. In practice, deployed commanders and judge advocates exercised all possible alternatives to avoid the crushing burdens of conducting courts-martial, from sending misconduct back to the home station, to granting leniency, to a more frequent use of administrative discharge procedures. By any measure—numbers of cases tried, kinds of cases, reckoning for servicemember crime, deterrence of other would-be offenders, contribution to good order and discipline, or the provision of a meaningful forum for those accused of crimes to assert their innocence or present a defense—it cannot be said that the American court-martial system functioned effectively in Afghanistan or Iraq. In an era of legally intensive conflicts,<sup>5</sup> this court-martial frailty is consequential and bears directly on the success or failure of our national military efforts.

The next four parts will approach this issue from the perspective of the journalist, attorney, military strategist, and policymaker, respectively. Part II explores court-martial practices in Afghanistan and Iraq from 2001 to 2009. After an overview of courts-martial conducted, the part draws on the accounts of hundreds of unit after-action reviews to investigate impediments to deployed justice. Next, the part scrutinizes the types of cases tried and how misconduct in the combat zone is treated differently than other misconduct. Combined, the information in this part finds expression in the “Burger King Theory” of combat zone courts-martial. This theory holds that courts-martial, like Burger King franchises, are sometimes present in the combat zone but cannot go “outside the wire” from the largest, most city-like bases.

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<sup>1</sup> NAT’L INST. OF MILITARY JUSTICE, REPORT OF THE COMM. ON MILITARY JUSTICE, OCTOBER 2009, at 1 (2009). This document is commonly called the “2009 Cox Commission Report.”

<sup>2</sup> James Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F.L. REV. 185, 191 (2002).

<sup>3</sup> CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008, at 289 (2009) [hereinafter FORGED IN THE FIRE]. This statement was made by the publication’s editors.

<sup>4</sup> Some related works include Major John M. Hackel, USMC, *Planning for the “Strategic Case”: A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine*, 57 NAVAL L. REV. 239, 244 (2009) (considering, “has the Marine Corps missed the mark with deployment justice, particularly with war crimes?”); Colonel Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 66–67 (2004) (attributing low Army-wide court-martial numbers from 2001 to 2003 to commanders adjusting to wartime realities by increasing their use of administrative discharges to clear growing caseloads); Captain A. Jason Nef, *Getting to Court: Trial Practice in a Deployed Environment*, ARMY LAW., Jan. 2009, at 50 (offering practitioner advice based on the author’s experience and emphasizing how to minimize trial delay from production of

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witnesses for courts-martial in Iraq); Captain Eric Hanson, *Know Your Ground: The Military Justice Terrain of Afghanistan*, ARMY LAW., Nov. 2009, at 36 (describing the added difficulties of performing courts-martial in Afghanistan).

<sup>5</sup> This phrase was coined by Colonel Marc L. Warren. COLONEL MARC L. WARREN, TEACHING THE JAG ELEPHANT TO DANCE . . . AGAIN (Strategy Research Project, U.S. Army War Coll.) (Apr. 9, 2002), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA404517&Location=U2&doc=GetTRDoc.pdf>. Colonel Warren used the term to describe military operations other than war that followed the Cold War. The term may also be an appropriate description of any military campaign where legal considerations are prominent, including Afghanistan and Iraq. As one observer noted, “Based on a very incomplete picture of what’s happening day to day in Iraq, it appears that there’s much more attention to human rights and to the laws of war than, for example, in Vietnam or Korea.” Brad Knickerbocker, *Is Military Justice in Iraq Changing for the Better?*, CHRISTIAN SCI. MONITOR, Aug. 7, 2007, at 1 (quoting Loren Thompson of the Lexington Institute).

Part III provides a legal analysis of two court-martial procedures—good military character evidence and expert witness rules—that each have the potential to thwart efforts to try cases in the combat zone.<sup>6</sup>

Part IV highlights the downstream consequences of a weak regime of criminal adjudication during overseas deployments. Although the present system's weaknesses have several troubling implications, the part is limited to two strategic consequences of combat court-martial frailty: the link between courts-martial and counterinsurgency success, and diminished American legitimacy when perceptions of military impunity foment.

Part V surveys a range of possible solutions to strengthen military justice in combat, including some that are outside the mainstream of current opinion. The suggestions range from minor changes, such as adjusting service regulations, to a wholesale reconsideration of some bedrock principles of military law.

## II. The Court-Martial Goes to War: 2001 to 2009

*Wherever there are troops, there will be criminal activity.*<sup>7</sup>

Figure 1<sup>8</sup> shows the number of special and general courts-martial<sup>9</sup> conducted in Afghanistan and Iraq from 2001 to 2009. The frequency of special and general courts-martial conducted per 1000 Soldiers per year is shown in figure 2.<sup>10</sup>

<sup>6</sup> “Combat zone” is not a doctrinal Army term, but is used throughout this article to describe the variety of conditions of the American military presence in Afghanistan from 2001 to 2009 and Iraq from 2003 to 2009. Doctrinal operational themes that have variously been applied to each of these combat zones include major combat operations, irregular warfare, peace operations, and limited intervention. On the doctrinal spectrum of violence, these combat zones included unstable peace, insurgency, and general war. For descriptions of these terms, see U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS ¶ 2-5 (27 Feb. 2008).

<sup>7</sup> Memorandum for Record from Major Jeff A. Bovarnick, U.S. Army, subject: Notes from the Combat Zone 5 (2002) [hereinafter Bovarnick Memorandum] (on file with author). Major Bovarnick wrote the memorandum while serving as the Chief of Operational Law for Combined Joint Task Force 180 in Afghanistan.

<sup>8</sup> The statistics in Figure 1 were provided by Colonel Stephen Henley, the Army Chief Trial Judge (on file with author).

<sup>9</sup> Special and general courts-martial are the two kinds of court-martial that resemble civilian trials. They feature a judge, formal proceedings, prosecution and defense attorneys, (often) a panel of military members for jury, and (often) verbatim transcripts of the proceedings to aid appellate review. Both can adjudge punitive discharges and confinement. The chart does not include the summary court-martial, which “unlike a criminal trial, is not an adversarial proceeding.” *Middendorf v. Henry*, 425 U.S. 25, 26 (1976). See also UCMJ art. 20 (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1301-06 (2008) [hereinafter MCM]; U.S. DEP’T OF ARMY, PAM. 27-7, GUIDE FOR SUMMARY COURT-MARTIAL TRIAL PROCEDURE (15 June 1985).

<sup>10</sup> The chart at Figure 2 should be used as a guide only, since determining the precise number of Soldiers in Afghanistan and Iraq each year was inexact. The author relied on newspaper reporting, statements and releases by military leaders, annual reports to Congress, and occasional statements

The data from these two figures show that courts-martial were scarcer in combat zones than in the rest of the Army. In Iraq, courts-martial began during the first year of operations, peaked in numbers in 2005, then settled into relatively low numbers and frequency. Afghanistan started slower, with no courts-martial held until the fourth year of that conflict, followed by more frequent courts-martial in the middle of the decade, until plummeting numbers in 2008 and 2009. The 672 Army courts-martial tried in either Afghanistan or Iraq from 2001 to 2009 were the majority of all courts-martial in the combat zone among the military services.<sup>11</sup>

But numbers do not tell the whole story. Vietnam offers an important lesson about assuming the success of the court-martial system based solely on court-martial numbers. After that war, the former commanding general of U.S. forces in Vietnam and the top Army lawyer concluded that the court-martial system did not function effectively despite an impressive number of cases tried. “In view of the developments in Vietnam, especially from 1969 on, it simply cannot be claimed that the military justice system

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by the Secretary of Defense. Figure 2 factored in adjustments based on some reported deployment numbers that included members of other services, some reports that did not include special operations forces, and some reports that included Kuwait troop totals in reported Iraq numbers. For these reasons, reporting in the *Army Times* newspaper was a helpful secondary source to confirm primary reports, since its weekly edition includes a chart listing locations and composition of deployed units. Totals for the Army include reservists who are called up to active service. All data is on file with the author. For more on troop deployments, see the helpful historical deployment overview chart at Ann Scott Tyson, *Support Troops Swelling U.S. Force in Afghanistan*, WASH. POST, Oct. 13, 2009, available at [http://www.washingtonpost.com/wp-yn/content/article/2009/10/12/AR2009101203142\\_2.html?nav=emailpage](http://www.washingtonpost.com/wp-yn/content/article/2009/10/12/AR2009101203142_2.html?nav=emailpage). The author thanks Mr. Daniel Lavering, Librarian at The Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia, and Ms. Monica Parkzes, the Research Librarian at *Military Times* Publications in Springfield, Virginia, for their helpful assistance with finding historical reporting on troop numbers.

<sup>11</sup> From 1 January 2002 through 31 December 2009, the U.S. Navy conducted one general and one special court-martial in Iraq, and the U.S. Marine Corps had conducted six general and twenty-one special courts-martial. E-mail from Captain B. W. MacKenzie, Chief Judge, Navy-Marine Corps Trial Judiciary, to author (Feb. 18, 2010 14:09 EST) (on file with author). The U.S. Air Force had fifty cases of misconduct from Afghanistan and Iraq that eventually resulted in a general or special court-martial; however, Air Force records do not indicate the location of the court-martial, meaning that the number includes those that were eventually tried in the United States. E-mail from Brian Hummel, Air Force Legal Operations Agency, Military Justice Div., to author (Feb. 18, 2010 04:26 EST) (on file with author). Based on other accounts, the number of Air Force courts-martial in the combat zone appears to be extremely small. See REPORT OF THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES AIR FORCE TO THE AMERICAN BAR ASSOCIATION 21 (Feb. 2007) (stating that the Air Force did not convene a court-martial in Iraq until December 2006); *AF Holds First Court-Martial in Afghanistan*, A.F. TIMES, Apr. 25, 2008, available at [http://www.airforcetimes.com/news/2008/04/airforce\\_afghan\\_court\\_martial\\_042408w/](http://www.airforcetimes.com/news/2008/04/airforce_afghan_court_martial_042408w/) (noting that the Air Force held its first court-martial in Afghanistan in April 2008).

**Special and General Courts-Martial Conducted, 2001–2009**

<b>Jurisdiction</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
All Army	1206	1438	1343	1353	1546	1358	1446	1165	1166
Afghanistan	0	0	0	7	18	22	28	22	11
Iraq	n/a	n/a	37	117	144	79	92	63	32

Fig. 1

**Frequency of Special and General Courts-Martial per 1000 Soldiers, 2001–2009**

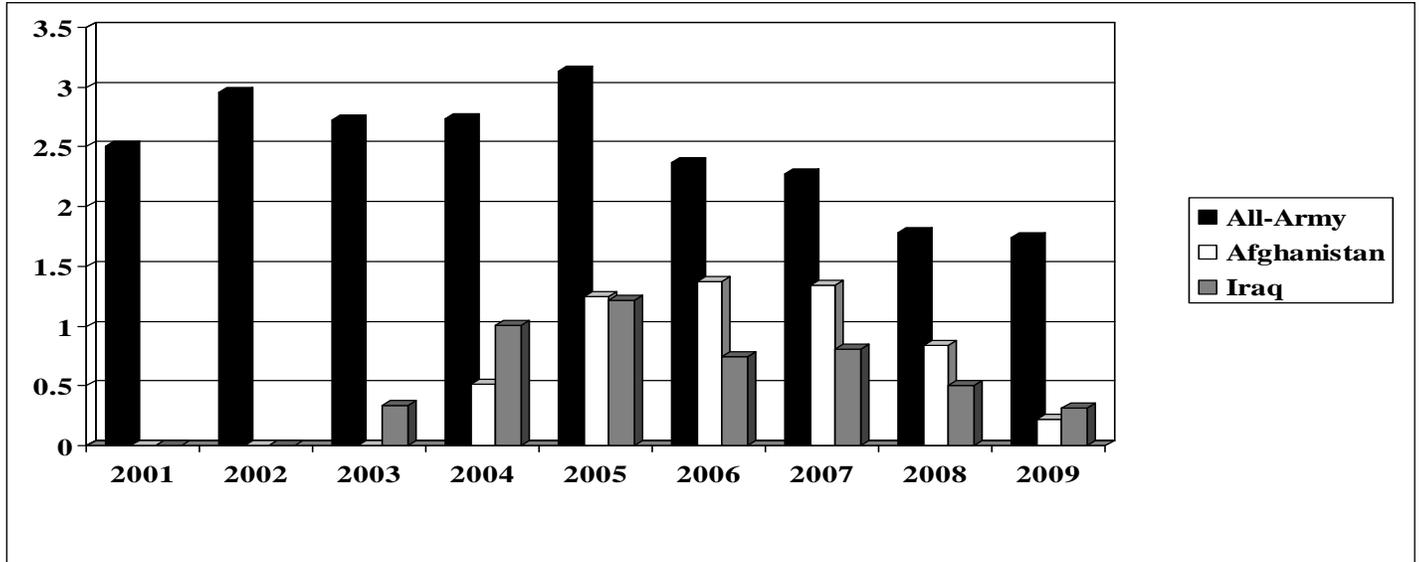


Fig. 2

adequately performed its intended roles in that limited war.”<sup>12</sup> The lack of after-action reviews to document the system’s deficiencies in combat was one focus of their lament.

Many commanders found the procedures less than satisfactory because of the difficulties in performing their operational tasks and at the same time meeting the time restrictions imposed by the military justice system. Many deserving cases simply were not referred to trial, with consequences on discipline impossible to calculate but obviously deleterious. The requirements for the presence of witnesses, counsel, and investigating officer to meet in an Article 32 Investigation (similar to a preliminary examination) were difficult to satisfy. Inability to obtain prompt evidence from departed witnesses, the twelve-month rotation policy, the extension of the right to civilian counsel from the United States, the total disruption of an operational unit when a major court-martial was involved—all of these are variously mentioned by knowledgeable commanders. Regrettably, these comments, observations, and complaints were rarely collected, examined, and evaluated to determine the true impact of the system, and the true impact of the system of military discipline. Statistics do not reflect these serious problems.<sup>13</sup>

Because the only statistics available were case totals, there was no actionable data to compel policy changes to correct combat court-martial deficiencies. The hard-learned lessons of Vietnam, they worried, might be lost without meaningful data to support what was widely known by commanders.

But times have changed, at least as far as court-martial data is concerned. Today, considerably more data on responses to misconduct from Afghanistan and Iraq is available. The Army’s Center for Law and Military Operations (CLAMO) gathered legal lessons learned from most major units that deployed to those two countries, including insights on military justice.<sup>14</sup> This part draws

<sup>12</sup> General William Westmoreland & Major General George Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL’Y 1, 60 (1980).

<sup>13</sup> *Id.*

<sup>14</sup> Some of the comments from these after action reports can also be found in four CLAMO publications: (1) *Legal Lessons Learned from Afghanistan and Iraq, Volume 1*; (2) *Lessons Learned from Afghanistan and Iraq, Volume 2*; (3) *Forged in the Fire: Legal Lessons Learned During Military Operations 1994–2008*; and (4) *Tip of the Spear: After Action Reports from July 2008–August 2009*. CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LEGAL

from 276 after-action reviews (AARs) collected by CLAMO from Iraq and Afghanistan.<sup>15</sup> Few AARs were completed in the early years of the Afghanistan conflict, so I interviewed judge advocates then present to fill in the gaps. Combined, this information helps answer questions that numbers alone do not reveal: How closely did court-martial numbers correlate to serious misconduct? What types of cases were brought to trial? What role did a unit’s location play? Is crime committed on deployment treated differently than crime committed in the United States?

## A. Beyond the Numbers

### 1. Major Combat Operations

In Afghanistan and Iraq, a high operations tempo promoted good behavior, while inactivity sowed misconduct. A judge advocate with an Army division that fought through Iraq in 2003 before settling into a base near Mosul, Iraq, wrote, “Expect MJ [military justice actions] to surge in proportion to the length of time you are stationary. As long as the Division was on the move, soldiers were too busy fighting the war to have the time to get into trouble. MJ simply exploded once we became stationary.”<sup>16</sup> Likewise, a judge advocate in Afghanistan in early 2002 credited his unit’s lack of serious misconduct to the intensity of combat operations and the lack of downtime: “Why was the misconduct low in number and severity? A mix of really busy, tired troops, some good luck, good leaders, and good grace, I suppose.”<sup>17</sup> As a caveat to these conclusions, the

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LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001–1 MAY 2003) (2004) [hereinafter LEGAL LESSONS VOLUME I]; CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II: FULL SPECTRUM OPERATIONS (2005) [hereinafter LEGAL LESSONS VOLUME II]; FORGED IN THE FIRE, *supra* note 3; CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, TIP OF THE SPEAR: AFTER ACTION REPORTS FROM JULY 2008–AUGUST 2009 (2009) [hereinafter TIP OF THE SPEAR]. All after-action reviews (AAR) listed throughout this paper are on file with CLAMO at the Army’s Judge Advocate General’s Legal Center and School in Charlottesville, Virginia. The first three publications include some of the AAR points incorporated into the analysis by the CLAMO editors but do not include all of the military justice lessons found in the unit AARs. These three volumes are unclassified. *Tip of the Spear* has comprehensive coverage of AARs in place of the editorial analysis in the earlier volumes. However, since this comprehensive coverage was limited to thirteen months of AARs, no combination of publications included all of the pertinent AARs, so the author still reviewed each AAR individually. Due to its unfiltered reprinting of AAR comments, *Tip of the Spear* is classified as For Official Use Only, meaning that it is restricted to the public, but all excerpts from AARs in this paper are unclassified. The CLAMO website is <https://www.jagcnet.army.mil/clamo>.

<sup>15</sup> The author obtained permission to access CLAMO’s digital archives.

<sup>16</sup> 101st Airborne Division (Air Assault), Office of the Staff Judge Advocate, After Action Report (AAR) (Operation Iraqi Freedom (OIF)) 51 (2004).

<sup>17</sup> E-mail from Lieutenant Colonel J. Harper Cook, Deputy Staff Judge Advocate, 21st Theater Support Command, to author (Jan. 27, 2010 06:01

fog of major combat operations may make some misconduct more difficult to detect. A judge advocate in Iraq in 2004 initially “thought the size of the caseload was inversely proportional to the operational tempo of the unit. This assessment, however, was false. Crimes occur at all times during the deployment, including times of intense combat activity and during times of relative calm.”<sup>18</sup>

Neither special nor general courts-martial were conducted during initial major combat operations. The thirty-seven special and general courts-martial tried in Iraq in 2003 did not begin until later that summer, after “active combat” ended.<sup>19</sup> Meanwhile, no special or general courts-martial were conducted in Afghanistan until 2004, the fourth year of that conflict.<sup>20</sup>

Several factors may have contributed to the absence of courts-martial in Afghanistan in the first years of combat operations. In the months after 9/11, American military forces had higher morale and were less likely to commit serious misconduct. “A surge of patriotism has kept morale, recruiting and retention high since the attacks on New York and Washington.”<sup>21</sup> Likewise, a senior judge advocate in Afghanistan in 2002 believed that Soldiers had a clear sense of purpose and were less likely to get into trouble because the United States had just been attacked.<sup>22</sup>

Even if a court-martial had been needed early in the Afghanistan conflict, conducting it would have been nearly impossible. The same judge advocate who described conditions in Afghanistan in 2002 recalled,

We would have had to fly in a TC [trial counsel], TDS [trial defense services] Counsel, Judge, court-reporter, etc., and not only were flights erratic but the priority on flying in personnel were more troops and beans and bullets. There was no place to quarter any visitors—water and food were scarce, and there really was no

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EST) (on file with author). Lieutenant Colonel Cook served with 3d Brigade, 101st Airborne Division in Kandahar, Afghanistan from January to July 2002, a period of intense ground combat. *Id.*

<sup>18</sup> Captain Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT)*, ARMY LAW., Dec. 2004, at 22, 31.

<sup>19</sup> “Trials of soldiers in the Iraq and Kuwait areas commenced shortly after the active combat phase ended, and increased in number over the summer and fall.” ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES § 3 (2003) (Comment of the Army Trial Judiciary, within the Report of The Judge Advocate General of the Army).

<sup>20</sup> See *supra* text accompanying note 8 (fig.1).

<sup>21</sup> Thomas Ricks & Vernon Loeb, *Unrivaled Military Feels Strains of Unending War*, WASH. POST, Feb. 16, 2003, at A01.

<sup>22</sup> See E-mail from Colonel (Retired) Kathryn Stone, to author (Oct. 29, 2009 13:27 EST) (on file with author). At the time, Colonel Stone was the Staff Judge Advocate for the 10th Mountain Division.

downtime in which to pull our limited troops off of their operational duties in order to run a court.”<sup>23</sup>

Gradually, however, the “no resources” rationale against conducting courts-martial diminished as U.S. forces became more settled in Afghanistan. As they did so, criminal misconduct began its inevitable percolation. One judge advocate wrote in late 2002 that “some cases warrant a court-martial”<sup>24</sup> but explained that the offenders in question were sent back to the United States for trial rather than tried in Afghanistan.<sup>25</sup> Reports by CLAMO noted the continuation of this practice throughout the first two years of Afghanistan: “Cases involving more serious misconduct were transferred to the United States for prosecution due, in part, to the austere conditions in Afghanistan.”<sup>26</sup>

These comments indicate that, once settled, commanders at least had the capacity for air movement (since they could fly accused, escorts, and evidence back to the United States), but that they elected to use those assets to send cases away rather than convene courts-martial in theater. Why was this so? A military paralegal with an infantry unit engaged in combat in Afghanistan in 2009 explained his unit’s reasons for not pursuing courts-martial in country:

Missions don’t stop for courts-martial and if we have to pull a squad off the line to testify against a Soldier who is causing trouble, then someone needs to cover down for them. . . . [O]ur Brigade is already spread very thin and assets are very hard to come by. A squad who would normally be assigned to refit after spending two weeks without a shower or hot chow would be required to stay out longer depending on the duration of the court-martial. Key leaders, such as squad leaders, platoon sergeants, platoon leaders, first sergeants, and commanders end up absent from the fight and leave their units short on leadership. It’s a dangerous

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<sup>23</sup> *Id.*

<sup>24</sup> Bovarnick Memorandum, *supra* note 7.

<sup>25</sup> *Id.*

<sup>26</sup> LESSONS LEARNED VOLUME I, *supra* note 14, 237; see also Office of the Clerk of Court, U.S. Army Judiciary, Cases Charged with an Offense Committed in Iraq, Afghanistan, or Kuwait CY 2001 through CY 2009 (Oct. 8, 2009) (on file with author) (showing that thirteen special and general courts-martial were conducted in the United States to adjudicate crime from Afghanistan before the first court-martial was conducted in Afghanistan in 2004). The report from the Office of the Clerk of Court also shows that even after courts-martial began to be conducted in Afghanistan in 2004, the practice of sending offenders back to the United States for adjudication remained common. The author thanks Mr. Randall Bruns from the Clerk of Court office for his assistance in compiling this data.

situation and the unit is more likely to send the Soldier back to the rear provisional unit [at Fort Bragg, North Carolina] to be court-martialed as opposed to doing it out here.<sup>27</sup>

In combat operations, commanders focused their limited resources on the fight at hand. Sending serious misconduct away was considered a more effective use of resources than conducting courts-martial on site.

## 2. Witness Production

The most common court-martial difficulty cited by deployed units was securing the live testimony of witnesses.<sup>28</sup> A judge advocate with a unit in Iraq in 2009 explained: “Requesting witnesses from the Continental United States (CONUS) or from Iraq and arranging travel proved to be extremely difficult.”<sup>29</sup> Units were responsible for preparing civilian witnesses to enter a combat zone, a task that required time, effort, and interagency cooperation. A judge advocate in Afghanistan in 2009 noted some of these difficulties:

Arranging travel for civilian witnesses and defense counsel into theater was very problematic. Civilians must have a passport, country clearance, visa, interceptor body armor (IBA), Kevlar helmet, and a DoD identification card before traveling to Afghanistan for trial. The unit learned the requirements through trial and error. In one case, a civilian witness was unable to board the aircraft leaving Kuwait because of the lack of a DoD ID card.<sup>30</sup>

Witness issues were often the “make or break” factor in whether courts-martial would occur at all. As a judge advocate in Iraq in 2007 explained, “The most challenging

aspect of trying cases in Iraq was the specter of calling witnesses forward from outside Iraq to testify and the possibility that the need to obtain such witnesses would derail the court-martial.”<sup>31</sup> Another judge advocate confirms that witness production demands did indeed cause derailment of deployed courts-martial, writing, “It was extremely challenging to get civilian witnesses into theater. Consequently, in some cases where calling civilian witnesses was unavoidable, the court-martial would move to Atlanta . . . .”<sup>32</sup>

## 3. Court-Martial Panels

Selecting and maintaining court-martial panels presented numerous difficulties during deployments.<sup>33</sup> In a combat zone, performing courts-martial with members is logistically complex, involves dangerous travel in bringing all members to the court, and can take leaders away from their combat duties. As one legal office reported, “The unit struggled with convening courts-martial member trials when scheduled to occur. Specifically, many members were located in remote areas of the jurisdiction. This made travel to COB [Contingency Operating Base] Speicher [near Tikrit, Iraq] for courts-martial trials difficult.”<sup>34</sup> Panel difficulties extended even to large, stable, garrison-style bases where the pool of potential members was co-located, presumably an “easier” to bring a panel to bring together for court: “[Our division-level command] needed to select three or four different court-martial panels during their deployment because the units changed out so often.”<sup>35</sup>

Perhaps anticipating these difficulties, numerous senior Army commanders decided outright not to choose panels or convene special and general courts-martial. For example, in early Iraq, at least three Army divisions each decided not to try cases. The 82d Airborne Division declared its commander a General Court-Martial Convening Authority (GCMCA), but only for the purpose of appointing investigating officers for certain administrative investigations.<sup>36</sup> The 101st Airborne Division “made the decision not to try any general or special courts-martial in the deployed theater”<sup>37</sup> during its yearlong deployment.

<sup>27</sup> E-mail from Sergeant James Marcum, to author (Feb. 22, 2010 03:25 EST) (on file with author). Sergeant Marcum was a paralegal noncommissioned officer (NCO) with the 4th Brigade Combat Team of the 82d Airborne Division.

<sup>28</sup> See *infra* Part III.A for legal requirements to produce witnesses based on the Sixth Amendment. As one judge advocate summarized, “The 6th amendment’s guarantees boil down to this: the government needs to produce all its witnesses in person. Video-teleconference or telephonic testimony may not satisfy the 6th amendment.” 101st Airborne Div. (Air Assault), Office of the Staff Judge Advocate, Task Force Band of Brothers After Action Report 79 (OIF 05-07) (2007) [hereinafter 101st Airborne OIF 2007].

<sup>29</sup> 1st Armored Div., Office of the Staff Judge Advocate, After Action Review (OIF) 36 (19 Feb. 2009) [hereinafter 1st Armored OIF 2009].

<sup>30</sup> 101st Airborne Division (Air Assault), Office of the Staff Judge Advocate, After Action Review (Operation Enduring Freedom (OEF)) 40 (28 Aug. 2009) [hereinafter 101st Airborne OEF 2009].

<sup>31</sup> 101st Airborne OIF 2007, *supra* note 28, at 79. Other witness production considerations are discussed later. See Part II.D (discussing the Burger King Theory); Part III.A (requirements to produce character witnesses); Part III.B (requirements to produce expert witnesses).

<sup>32</sup> Senior Defense Counsel, Camp Arifjan, Kuwait, After Action Report (13 Oct. 2009).

<sup>33</sup> See V Corps, Office of the Staff Judge Advocate (OSJA), After Action Report (OIF) 13 (May 2007) [hereinafter V Corps OIF 2007].

<sup>34</sup> 1st Armored OIF 2009, *supra* note 29, at 37.

<sup>35</sup> 10th Mountain Div., After Action Review (OIF) 33 (24-25 June 2009) [hereinafter 10th Mountain OIF 2009].

<sup>36</sup> FORGED IN THE FIRE, *supra* note 3, at 242.

<sup>37</sup> LESSONS LEARNED VOLUME I, *supra* note 14, at 243.

Likewise, the 3d Infantry Division did not select a panel and “did not try any general or special courts-martial in the deployed theater before it redeployed in August of 2003.”<sup>38</sup>

#### 4. Military Judges

Units also mentioned the lack of easy access to a military judge in theater as a reason for diverting misconduct away from the court-martial track. One judge advocate wrote, “The argument that there is insufficient work in theater to justify a full-time judge is a self-fulfilling prophecy. Units divert cases from court-martial because there is no judge in theater. This gives the impression there is not enough court-martial work in theater to justify the presence of a judge.”<sup>39</sup> Another judge advocate explained his unit’s decision to try serious offenses that would normally warrant general court-martial at summary courts-martial as follows: “Because a full trial at a ‘general’ court-martial was time-consuming—requiring a military judge to fly into Iraq—our brigade often used ‘summary court-martial,’ a trial where the judge could be one of our higher-ranking field grade officers. . . .”<sup>40</sup> Returning units frequently commented on judicial coverage and flexibility, assessing both in a broad range from poor<sup>41</sup> to excellent.<sup>42</sup>

<sup>38</sup> *Id.* at 242.

<sup>39</sup> 1st Combat Support Brigade (Maneuver Enhancement), Task Force Warrior, After Action Review (OEF), June 2008–Sept. 2009, at 14 (20 Oct. 2009) [hereinafter Task Force Warrior OEF 2009]. *But see* Interview with Colonel Stephen Henley, Chief Army Trial Judge, in Charlottesville, Va. (Feb. 18, 2010) [hereinafter Colonel Henley Interview]. Colonel Henley corrected the notion that there was no judge in theater, saying that the Central Command (CENTCOM) theater has been under continuous coverage of an Army judge since 2003. “We can get judges there [to courts-martial in Iraq] within three days.” *Id.* It takes about a week to get a judge to a court-martial in Afghanistan due to greater travel difficulties there. Senior commanders afforded judges and select court-martial personnel high priority for flight manifests, which Colonel Henley believes helps get judges to courts-martial faster. Colonel Henley also noted that trial dockets are posted and publicly available on the Internet, which allows units to plan ahead for trial terms. Starting in the summer of 2010, a full-time judge will serve a one-year tour in Kuwait in order to cover cases in both Iraq and Afghanistan. Currently, an activated reservist judge or judge from the Army’s 5th judicial circuit in Germany serves for two to three months at a time in the CENTCOM theater; if there is not enough work in theater, the judge may return to home station in Germany or the United States. *Id.*

<sup>40</sup> PATRICK J. MURPHY WITH ADAM FRANKEL, *TAKING THE HILL: FROM PHILLY TO BAGHDAD TO THE UNITED STATES CONGRESS* 124 (2008). The former Captain Murphy served as an Army judge advocate with the 325th Airborne Infantry Regiment of the 82d Airborne Division in Baghdad, Iraq, from 2003 to 2004, before his election to Congress from Pennsylvania’s 8th District.

<sup>41</sup> “If the UCMJ is intended to be expeditionary, the supporting establishment must be as well. We should either deploy judges adequately to satisfy the demand or admit that the UCMJ is a garrison tool. We cannot have it both ways.” Lieutenant Colonel R. G. Bracknell, Staff Judge Advocate, Regimental Combat Team 5, U.S. Marine Corps, After Action Report (OIF) 11 (7 Aug. 2008).

<sup>42</sup> “The judiciary provided excellent support to the BCT. The judges were available, flexible, and understanding of the challenges associated with conducting cases in a deployed environment.” Brigade Judge Advocate, 3d

#### 5. Other Court-Martial Challenges

In addition to difficulties associated with witness production, panel selection, and access to judges, judge advocates faced a number of other court-martial challenges in theater. For example, given the high operations tempo of combat, military justice was often a less immediate concern, and judge advocates who focused primarily on criminal law in the United States quickly discovered that competing priorities vied for their time and attention on deployments. “In garrison, criminal law is absolutely the number one priority. Once deployed, it became the fifth priority behind DetOps [Detainee Operations], OpLaw [Operational Law], RoL [Rule of Law], and investigations.”<sup>43</sup>

Additionally, organizational hierarchies that were linear and easily understood in garrison tended to become confused on deployment. Modularity, a “plug and play” concept that emphasizes interchangeable units rather than organic divisions and brigades, “makes all areas of military legal practice difficult” because hierarchies and jurisdictions constantly shift as various units enter and exit theater.<sup>44</sup> The jurisdictional problems associated with modularity and unit movement were not limited to the early years of the deployments. Units in Iraq and Afghanistan shifted frequently on paper and on the ground, which made determining the higher headquarters in charge of a subordinate unit difficult.<sup>45</sup> One brigade judge advocate noted the natural consequence of this: “The brigade commander did not always have jurisdiction over personnel assigned to his unit.”<sup>46</sup>

Joint operations that intermixed Soldiers, Marines, Sailors, and Airmen further hindered the efficient application of military justice. “Joint Justice . . . is still a challenge: it is very difficult to track AF and Navy misconduct actions—as well as their investigations into said misconduct.”<sup>47</sup> Service parochialism often outweighed the

Brigade Combat Team, 101st Airborne Division (Air Assault), After Action Review (OIF) 13 (2009).

<sup>43</sup> 101st Airborne OEF 2009, *supra* note 30, at 35.

<sup>44</sup> TIP OF THE SPEAR, *supra* note 14, at 371.

<sup>45</sup> *See, e.g.*, 4th Infantry Division, After Action Review (OIF 05–07) 30 (2007) (“The military justice jurisdiction in theater changed constantly due to units being assigned or attached to MND-B [Multi-National Division, Baghdad] either as OPCON [operational control] or TACON [tactical control]”); Memorandum from Staff Judge Advocate, to Commanding General, III Corps, subject: Operation Iraqi Freedom (OIF) After Action Report (AAR) 4 (10 Jan. 2008).

<sup>46</sup> 101st Airborne Division (Air Assault), 4th Brigade Combat Team, Brigade Judge Advocate, After Action Report (OEF), March 2008–March 2009 (12 May 2009).

<sup>47</sup> Brigade Combat Team, After Action Review (OIF) 1 (2007) (on file with CLAMO). The unit and author of this AAR are not identified. For analysis of the challenges of inter-service military justice, see Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 66 (1996); Major Mark W. Holzer, *Purple Haze: Military Justice in Support of Joint Operations*, ARMY LAW., July 2002, at 1.

combat commander's ability to seek justice: "The Navy and Marine Corps typically sent their personnel out of theater when misconduct arose."<sup>48</sup> Another unit wrote, "Although the Manual for Courts-Martial (MCM) permits joint justice, there was no unified service approach to military justice. Each service handled its own military justice matters."<sup>49</sup>

Furthermore, units usually had fewer resources to investigate crime in theater. In garrison, military police investigators (MPI) investigate minor offenses and the Criminal Investigation Division (CID) investigates major offenses. However, MPI do not deploy.<sup>50</sup> Meanwhile, although CID agents do deploy, their mission expands to other areas, such as the investigation of war crimes allegations and non-combat related deaths, which detracts from the time available to investigate other crimes.<sup>51</sup> Thus, many units were often left to investigate crimes on their own.

The logistics of deployments also create unique challenges in addressing certain crimes. For example, drug offenses are more difficult to pursue on deployment. The detection of drug-related misconduct often depends on a urinalysis, but commanders often have few resources and limited capability to test Soldiers, particularly in austere locations. A paralegal NCO explained,

Urinalysis does not happen as often as . . . in the states. The cups the UPLs [unit prevention leaders] bring with them are all the commanders have for the deployment. . . . Soldiers who have access to hashish, opium, and other narcotics through the local nationals are more likely to experiment (as first timers) or continue their habitual use.<sup>52</sup>

## B. Guilty Pleas: the One Kind of Case that Can Survive in Combat

Guilty plea cases, which ease the Government's burden to present evidence and witnesses to prove the elements of charged crimes, were sometimes the only cases that could be feasibly tried on deployments.<sup>53</sup> No deployment AAR from

2001 to 2009 described success at trying multiple contested cases. Instead, most units limited their courts-martial to guilty pleas. One division explained, "Because the 10th Mountain Division held only fourteen guilty pleas and no contested courts-martial, they never actually had to bring in a civilian witness from outside Iraq."<sup>54</sup> Another Army division in northern Iraq from 2005 to 2007 reported that it tried twenty-two cases, all on their main base, Contingency Operating Base Speicher.<sup>55</sup> Of those twenty-two cases tried, twenty were guilty pleas, and for each of the other two, the accused waived rights to produce witnesses and to demand a forum of panel members.<sup>56</sup> Another Army division sent its contested and complex cases back to the United States, where the accused "could exercise all of his or her due-process rights with minimal intrusion on the unit or danger to civilian and non-deployed DoD personnel."<sup>57</sup>

The heavy guilty plea practice may be rooted in past unit experiences that hotly contested cases were too difficult to perform in the combat zone. A judge advocate in Afghanistan in 2009 stated, "The expectation that you will be able to try as many contested cases to the same standard you can in garrison is unrealistic."<sup>58</sup> Contested cases triggered many of the difficulties described in this part, and successful defense counsel used those issues to their clients' advantage. For example, on the right to produce witnesses, a unit in Iraq wrote, "While the accused may waive their 6th amendment right of confrontation, they have no incentive to do so in a contested case."<sup>59</sup>

Because "tough" cases are difficult on deployments, they were routinely whisked away from the combat zone. A Marine judge advocate wrote: "For Marine Corps war crimes, these decisions have universally been the same: bring the case home."<sup>60</sup> Another typical comment came from a Special Forces unit, whose commander "referred all serious incidents of misconduct back to the group headquarters at Fort Campbell."<sup>61</sup> These comments, together with the frequent recourse to guilty pleas, show that the Government usually only tried cases in the combat zone if an accused waived procedural rights and plead guilty in

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orders. Such cases may not require any witnesses who are not already in country and become even more practicable to try in combat if the accused elects trial by judge alone.

<sup>54</sup> 10th Mountain OIF 2009, *supra* note 35, at 34.

<sup>55</sup> See Task Force Band of Brothers, OIF 2007, *supra* note 28, at 67.

<sup>56</sup> *Id.*

<sup>57</sup> 25th Infantry Division, Office of the Staff Judge Advocate (Military Justice Division), After Action Report (OIF), September 2006–October 2007, at 2–3 (2007).

<sup>58</sup> 101st Airborne OEF 2009, *supra* note 30, at 35.

<sup>59</sup> Task Force Band of Brothers, OIF 2007, *supra* note 28, at 79.

<sup>60</sup> Hackel, *supra* note 4, at 248.

<sup>61</sup> 5th Special Forces Group (Airborne), 1st Battalion, Battalion Judge Advocate, After Action Report (OEF) (11 Mar. 2010).

<sup>48</sup> 101st Airborne OEF 2009, *supra* note 30, at 38.

<sup>49</sup> Brigade Judge Advocate, Office of the Staff Judge Advocate, After Action Report (OEF) 23 (Sept. 2008).

<sup>50</sup> LESSONS LEARNED, VOLUME II, *supra* note 14, at 200.

<sup>51</sup> *Id.* at 199.

<sup>52</sup> Sergeant Marcum, *supra* note 27.

<sup>53</sup> *But see* Colonel Henley Interview, *supra* note 39. Colonel Henley has personally presided over contested cases in Iraq as a trial judge. Concededly, some contested cases may be more easily performed in the combat zone than others, particularly cases involving uniquely military offenses such as unauthorized absences, disrespect, or failures to follow

exchange for favorable treatment or a limited sentence. Hotly contested cases involving accused who vigorously asserted their rights were most often seen as too troublesome to try in country. Thus, the presence of courts-martial in the combat zone was more a factor of an offender's cooperation with the Government than an offense's impact on the mission.

### C. Combat Zone Discounting

Perhaps no other topic is as widely discussed among military justice practitioners yet never officially acknowledged as the "combat zone discount" for deployment misconduct. The term refers to the light or nonexistent punishment deployed offenders receive for crimes that would otherwise be more heavily punished if tried in courts-martial in the United States. Does such a discount exist? In one sense, the opposite may be true. Soldiers on deployment are subject to closer regulation than non-deployed Soldiers. Most are subject to a general order that prohibits certain conduct that would otherwise be acceptable outside the deployed theater, such as drinking alcohol after work or visiting the living quarters of a member of the opposite sex. Because minor infractions such as tardiness or sloppy vehicle maintenance often have greater consequences on a deployment, they also often have greater disciplinary consequences. Soldiers are subject to more regimented rules for the entire deployment, and can face corrective or disciplinary action if they violate them. Bad Soldiers (those who cannot conform their conduct to a stricter set of rules) may tend to fare worse during deployment and suffer a combat zone penalty, but the more narrow subset of truly criminal Soldiers stands to reap a real and tangible benefit from a combat zone discount due to the military's widespread proclivity to avoid courts-martial. An Army Trial Defense Services (TDS) attorney in Afghanistan summarized combat zone discounting for criminal misconduct as follows:

When strategizing cases, the TDS office always considered the environment. Contesting a case in theater is much more difficult on the unit than in a garrison environment and places significant limitations on the government. TDS JAs (judge advocates) should therefore strongly consider contesting cases. However, the TDS office was able, in many cases where they sought a pre-trial agreement, to get much more favorable pre-trial agreements for their clients.<sup>62</sup>

<sup>62</sup> U.S. Army, Trial Defense Servs., Combined Joint Task Force-101, Individual Augmentee Attorney, After Action Report (OEF), July 2008–July 2009, at 7 (5 Nov. 2009).

Judge advocates frequently cited "combat zone discounting" in AARs. Admittedly, some discounting may be due to commanders showing leniency to accused members who performed well in the dangers of combat, but the AAR comments focus on the discounting of cases the command would otherwise have taken to court-martial but for court-martial difficulties. As one judge advocate explained, "Commanders did not like the logistical load brought on by trials (or the loss of Soldiers available for the fight), therefore they did not forward many cases for court-martial."<sup>63</sup>

The military's broad aversion to combat zone courts-martial resulted in highly favorable treatment for many criminal accused who would otherwise have not received such favorable treatment. A judge advocate from a division in Afghanistan noted the need to offer unusually favorable terms in pre-trial negotiations with the defense in order to avoid the burdens of full trials: "You have to triage criminal law processing, and adjust pre-trial agreement terms to encourage more deals."<sup>64</sup> A military prosecutor from a brigade combat team in Iraq described the process of valuation that he encouraged his commanders to use when weighing the burdens of courts-martial as follows: "The trial counsel had to ensure commanders understood the additional cost in terms of effort and personnel to conduct judicial proceedings in country. This allowed commanders to make a reasonable calculation as to what a case was 'worth.'"<sup>65</sup> Discounting was often explicit: "V Corps JAs approached defense counsel in many cases and explicitly stated that they were willing to dispose of cases more generously (to the accused) than they otherwise might."<sup>66</sup>

Discounting misconduct was not just an Army phenomenon; similarly situated Marine commanders also tended to shun deployed courts-martial due to their difficulty. One AAR noted, "As a result of . . . prioritization, a decline in MJ [military justice] requirements occurred. Alternative dispositions when available and appropriate were used."<sup>67</sup> Another wrote, "As a result [of the unique deployed burdens of conducting courts-martial], there were few options for case dispositions. . . . Battalion commanders should be advised prior to deployment of the limitations of military justice support."<sup>68</sup>

<sup>63</sup> 3d Armored Cavalry Regiment, After Action Review (OIF), Nov. 2007–Jan. 2009, at 11 (22 Apr. 2009).

<sup>64</sup> 101st Airborne OEF 2009, *supra* note 30, at 35.

<sup>65</sup> 1st Brigade, 4th Infantry Division, After Action Report (OIF), March 2008–March 2009, at 13 (28 Apr. 2009).

<sup>66</sup> LESSONS LEARNED VOLUME I, *supra* note 14, at 247 (2004).

<sup>67</sup> 2d Marine Expeditionary Force, Executive Summary, subject: OSJA, II MEF After Action Report During OIF 06–08, at 10 (8 July 2008).

<sup>68</sup> 9th Marines, 1st Battalion, Battalion Judge Advocate, After Action Report (OIF), March 2008–October 2008, at 11 (9 Jan. 2009).

A judge advocate from a brigade-sized unit away from the larger division base in northern Iraq summed up the problem well: “Trial logistics are a nightmare. . . . The risk of a trial being ‘too hard’ is that there will be a ‘deployment discount’ on disposition of charges that will badly skew the application of the UCMJ.”<sup>69</sup>

#### D. The Burger King Theory of the Combat Zone Court-Martial

If a Soldier can eat at Burger King,<sup>70</sup> he is also more likely to face court-martial for any serious misconduct he may commit. If he is deployed somewhere without a Burger King, it is less likely that his misconduct will be addressed by court-martial. This notion, which suggests that combat zone courts-martial are rare except on stable, large, garrison-style bases, can be called the Burger King Theory.<sup>71</sup>

Undergirding the Burger King Theory are reports from brigade or smaller-sized units that served in remote areas, away from the large “Burger King bases” such as Victory Base Complex in Baghdad or Bagram Air Base north of Kabul. Few such units conducted *any* courts-martial. A brigade in al Anbar province in Iraq in 2009 wrote, “RCT-8 did not conduct courts-martial while deployed. RCT-8 handled all military justice matters through NJP (non-judicial punishment), or sent the accused back to the rear. This saved RCT-8 a substantial amount of time and resources that it otherwise would have spent conducting courts-martial.”<sup>72</sup> A unit in southern Afghanistan in 2009 wrote, “There is already enough strain personnel-wise on small FOBs [forward operating bases] just to meet the bare essentials for things like tower guard, entry control point teams, and basic staff functions. Pulling people for a court-martial just isn’t possible sometimes. Units on larger FOBs have the people to cover down if necessary.”<sup>73</sup> For many small units, going to larger bases to conduct courts-martial was entirely impractical as one judge advocate described:

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<sup>69</sup> Task Force Warrior OEF 2009, *infra* note 39, at 15.

<sup>70</sup> Burger King is a fast food chain with 7300 independently owned franchises in the United States, including all fifty states and most large active military installations. Burger King also opened franchises for the American military in a handful of large bases in deployment locations such as Kuwait City, Kuwait; Baghdad, Iraq; Balad, Iraq; Bagram Air Base, Afghanistan; and Kandahar, Afghanistan. The Burger King slogan is “Have it Your Way.” See BURGER KING, <http://www.bk.com> (last visited Jan. 16, 2010).

<sup>71</sup> This rule seems opposite of the Burger King slogan, as it holds that only those who do not have access to Burger King can “have it their way” and avoid official sanction for crime. For another theory of linkage between the presence of fast food and international affairs, see The Golden Arches Theory of Conflict Prevention, in THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE 248–75 (1999) (asserting that no two countries with McDonald’s fast food franchises have gone to war with each other).

<sup>72</sup> Regimental Combat Team 8 (RCT-8), Deputy Regimental Judge Advocate, After Action Report (OIF), at 11 (18 Dec. 2009).

<sup>73</sup> Sergeant Marcum, *supra* note 27.

Even a judge-alone SPCM/GCM [special court martial/general court martial] guilty plea typically required a JA traveling to Balad/Baghdad from Tallil to be away from his/her Command for 5–7 days. In Brigades with only one JA and one 27D [Army paralegal], a SPCM/GCM in Balad/Baghdad deprived the Command of its Command Judge Advocate for the trial’s duration and travel time. This deprivation often factored significantly in Commanders’ misconduct disposition analysis and likely resulted in dispositions that arguably were too lenient for the misconduct (e.g., convening Summary Courts-Martial on Camp Adder for hash and valium distributors/users).<sup>74</sup>

For smaller units located away from the large bases, attending to the many demands of courts-martial sometimes even came at the cost of shutting down the regular mission. One unit wrote:

Witness production in Iraq is resource intensive. Even moving Soldiers in theater for a court-martial will tax line units when the Soldiers live and work off Victory Base Complex. Every witness movement requires either a seat on helicopter or convoy. A contested rape case shut down a line company for almost a week as they moved witnesses and managed the other logistics associated with trial.<sup>75</sup>

Even if an accused from a “small base” were tried on a “Burger King base,” he might have grounds to challenge the legitimacy and fairness of the “Burger King base” panel. Many large units took shortcuts with panel selection, giving “preference . . . to members located on or near a main base”<sup>76</sup> in order to ease the logistical difficulties of bringing panels together for trials. However, the panel member selection criteria in Article 25 of the UCMJ do not include convenience or location of the members.<sup>77</sup> A defense counsel should be able to show the use of impermissible selection criteria and prejudice in having a “Burger King base” panel decide the case of a “small base” accused, and counsel may petition to include members from similar small bases on the panel. In this way, efforts to conduct courts-

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<sup>74</sup> V Corps OIF 2007, *supra* note 33, at 12.

<sup>75</sup> 1st Cavalry Division, Office of the Staff Judge Advocate, After Action Review (OIF) 12 (20 Nov. 2007), *quoted in* FORGED IN THE FIRE, *supra* note 3, at 313.

<sup>76</sup> FORGED IN THE FIRE, *supra* note 3, at 310.

<sup>77</sup> UCMJ art. 25(d)(2) (2008).

martial of offenses occurring on “small bases” are further complicated.<sup>78</sup>

The Burger King Theory helps make sense of Iraq court-martial numbers. The peak of 144 courts-martial in 2005 coincides precisely with the temporary concentration of U.S. forces onto large “Super FOBs” that year.<sup>79</sup> When the Iraq Surge dispersed Soldiers to smaller outposts that were closer to the Iraqi security forces and the Iraqi population, fewer courts-martial were conducted (just 63 in 2008 despite the presence of an additional 30,000 Soldiers).<sup>80</sup> In other words, large units that could successfully prosecute guilty plea cases when all parties were within the walls of a large, city-like base had a more difficult time when those parties were scattered among several remote locations.

The Burger King Theory also helps explain Afghanistan courts-martial numbers. The meager total of eleven courts-martial conducted there in 2009, despite a near doubling of the Army force, is best explained by the effort to spread out the forces to about two hundred small bases and outposts.<sup>81</sup> Interestingly, the trend towards more spread-out forces in Afghanistan (and lower court-martial numbers) coincides with an effort to close all Burger Kings in country.<sup>82</sup> Thus, Burger Kings and courts-martial were both relative luxuries reserved for the largest bases in Afghanistan. When the mission became more expeditionary and spread to a larger number of austere bases, both Burger Kings and courts-martial dwindled in numbers.

<sup>78</sup> This problem was observed in Afghanistan and recorded in Hanson, *supra* note 4, at 43–44.

<sup>79</sup> THOMAS E. RICKS, *THE GAMBLE* 15 (2009) (“He [General George Casey, then the Commanding General of Multi-National Force-Iraq] was pulling his troops farther away from the population, closing dozens of bases in 2005 as he consolidated his force on big, isolated bases that the military termed ‘Super FOBs.’”) (emphasis added).

<sup>80</sup> Christopher M. Schnaubelt, *Lessons of Iraq: Afghanistan at the Brink*, INT’L HERALD TRIB., Nov. 1, 2008, at 8:

While the increase in troop strength helped enable this shift [towards protecting the population], the new strategy also played a key role by moving coalition forces that were there before the surge off large bases and increasing their presence among the Iraqi population through more patrols and joint security stations with Iraqi soldiers and police.

<sup>81</sup> See Hanson, *supra* note 4, at 36–37. Captain Hanson wrote that by 2009, the Army in Afghanistan had spread across 200 bases and outposts, and judge advocates were only present on nine of those. The Trial Defense Services office and the military courtroom are both on Bagram Air Base. *Id.*

<sup>82</sup> Karen Jowers, *Whopper of a Decision: McChrystal Shuts Fast-Food Sellers in Afghanistan*, ARMY TIMES, Feb. 22, 2010, at 8 (describing an order by General Stanley McChrystal to limit morale and welfare programs to those tailored for an expeditionary force, a move that involved shuttering Burger King restaurants in Bagram and Kandahar). “Supplying nonessential luxuries to big bases like Bagram and Kandahar makes it harder to get essential items to combat outposts and forward operating bases.” *Id.* (quoting the top enlisted Soldier in Afghanistan, Command Sergeant Major Michael Hall).

Large bases can be reminiscent of civilian life—the atmosphere of a town or small city, civic functions, recreation opportunities, fully functioning utilities, fast food restaurants, and courts-martial whose parties and procedures resemble civilian trials in the United States. Not surprisingly, courts-martial that look like civilian trials seem capable only in such civilianized surroundings. If future operations consist of austere expeditions conducted without the permanent footprint of large bases, then deployed courts-martial may someday become a relic of military history rather than a viable commander’s tool.

### III. Procedural Shortcomings of Combat Zone Courts-Martial

*Complicating procedures which add only marginal increases in assurance of accuracy and truth-telling have no place in the combat, operational, or wartime system.*<sup>83</sup>

Some court-martial procedures that were developed in peacetime have dire, unintended consequences in combat. Because no “combat zone exception” exists for court-martial procedure,<sup>84</sup> the same rules apply both in and out of a combat theater. This part analyzes “good military character” evidence and expert witness rules, two procedures with at least two characteristics in common. First, each is unique in application to the military. Second, both are broad enough that they can mandate witness travel to the combat zone for nearly any trial, thus hindering efforts to try cases.

#### A. The “Good Military Character” Defense

In a civilian criminal trial, the defense may not assert that because the defendant is a good employee at work, he is

<sup>83</sup> Westmoreland & Prugh, *supra* note 12, at 52.

<sup>84</sup> INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, 2009 OPERATIONAL LAW HANDBOOK 401 (2009) (“Although legal considerations may differ depending of the mission, court-martial and NJP [non-judicial punishment] procedures remain largely unchanged in a deployed setting.”). Since the Afghanistan and Iraq conflicts began, one procedural change that improved the ability to conduct combat zone courts-martial was the President’s amendment of the *Manual for Courts-Martial* in 2007 to permit a military judge to allow any witness to testify on interlocutory questions by remote means if practical difficulties of producing the witness outweighed the need for personal appearance. See Exec. Order No. 13,430, 72 Fed. Reg. 20,213 (18 April 2007); MCM, *supra* note 9, R.C.M. 703(b)(1). On the other hand, the Army’s adoption of formal rules of practice in 2004 was noted as increasing the formality and complexity of courts-martial. “The Rules of Practice Before Army Courts-Martial, which were revised in May 2004, have placed an increased emphasis on formality, especially where motions practice is concerned. This change is likely to foster an increase in the complexity of future courts-martial.” ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE 6 (2004) (quoting the sub-report of the Army Trial Defense Service within the Report of The Judge Advocate General of the Army).

therefore unlikely to have committed a crime. Evidence is only admissible in trial if it is relevant.<sup>85</sup> In comparison, courts-martial allow a broader range of what is considered “relevant” by allowing evidence of an accused’s “good military character” to be introduced at trial on the merits. Military appellate courts have strengthened this affirmative defense<sup>86</sup> to the point where an accused can now “smother the factfinder with good soldier evidence regardless of the charges.”<sup>87</sup>

Given this expansiveness, imagination is the only limit of what demonstrates “good military character”; any desirable trait in a servicemember counts. In application, character witnesses are commonly called to testify about their willingness to deploy with an accused.<sup>88</sup> Other allowable “good military character” testimony includes that an accused is “dedicated to being a good drill instructor,”<sup>89</sup> lawful,<sup>90</sup> easygoing,<sup>91</sup> dependable,<sup>92</sup> and well liked.<sup>93</sup> With

<sup>85</sup> FED. R. EVID. 402; MCM, *supra* note 9, MIL. R. EVID. 402.

<sup>86</sup> FED. R. EVID. 404(a)(1); MCM, *supra* note 9, MIL. R. EVID. 404(a)(1). Although the military rule is worded exactly the same as the federal rule, military courts have broadly defined “pertinent character trait” as including good military character. The drafters of the Military Rules of Evidence in 1980 recognized a limited right to an accused offering good military character evidence. “It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.” MCM, *supra* note 9, at A22-33. The extent of this rule was tested in a series of military appellate cases in the 1980s, until the Court of Military Appeals broadened the applicability of the defense to nearly any military offense. In deciding that an Airman charged with stealing a television could present character evidence portraying him as an honest and trustworthy person, the court wrote, “We do not believe that it is inconsistent with the policy of Mil. R. Evid. 404(a) to apply this definition in deciding what character traits of an accused are ‘pertinent.’ Thus, for purposes of Military Rule of Evidence 404(a)(1), a character trait is ‘pertinent’ ‘when it is directed to the issue or matters in dispute, and legitimately tends to prove the allegations of the party offering it.’” *United States v. Elliott*, 23 M.J. 1, 5 (C.M.A. 1986). In sum, the court discarded the limiting guidance of the Drafter’s Analysis and opened the door for the admissibility of “good military character” evidence in any case.

<sup>87</sup> Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15, 22 (summarizing recent military appellate opinions which expanded the “good soldier” defense and allow it to be presented in any court-martial). Major Morris also noted that in most cases, disingenuous use of good military character evidence can be easily rebutted by the prosecution. *Id.* See also Robinson O. Everett, *Military Rules of Evidence Symposium: An Introduction*, 130 MIL. L. REV. 1, 3 (1990) (noting that the military appellate courts have “obliterated” the limitation of allowing only pertinent character traits by permitting the defense of good military character “in almost any conceivable trial by court-martial”). For a defense of the expanded “good military character” defense, see Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 MIL. L. REV. 171 (1990), which argues that “good soldier evidence” in some form has a long tradition in military trials.

<sup>88</sup> See, e.g., *United States v. True*, 41 M.J. 424, 427 (C.A.A.F. 1995).

<sup>89</sup> *United States v. Piatt*, 17 M.J. 442, 445 (C.M.A. 1984).

<sup>90</sup> *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1983).

<sup>91</sup> *United States v. True*, 41 M.J. 424, 427 (C.A.A.F. 1995).

<sup>92</sup> *United States v. White*, 36 M.J. 306, 307 (C.M.A. 1993).

so many traits to choose from that are permissible and admissible, nearly anyone can qualify as a “good Soldier.”

Some troubling peacetime consequences of allowing unfettered “good military character” evidence have already been studied, but the consequences for the combat zone also deserve consideration.<sup>94</sup> Military operations in Iraq and Afghanistan demonstrate the egalitarian potential of the defense as an immunity mechanism for any accused. The peacetime trial consideration of “Will this evidence be persuasive?” shifts in the combat zone to “Will this evidence force the Government to produce witnesses, thus requiring them to drop charges?”

Here is how “good military character” can change the equation. If an accused requests production of a witness at a court-martial and the Government does not approve the request, the military judge must decide the issue based on the materiality of the witness,<sup>95</sup> the judge’s improper denial of a relevant merits witness risks appellate reversal. Because of the limits of military subpoenas,<sup>96</sup> the trial counsel may be powerless to force a witness to leave the United States, especially if the witness is a civilian or is no longer on active duty in the military. Military judges lack the power to force such witnesses to cooperate or appear at trial.<sup>97</sup> Ultimately, if the Government fails to provide a

<sup>93</sup> *United States v. Hallum*, 31 M.J. 254, 255 (C.M.A. 1990).

<sup>94</sup> Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 908–09 (1999). Professor Hillman argued that the “good military character” defense serves as an immunity shield to protect high-ranking servicemembers from criminal convictions by masking subtle privileges of gender and race in a military society with few high-ranking women or ethnic minorities.

<sup>95</sup> A servicemember at court-martial is entitled to the live production of necessary witnesses to support a defense and the right to live confrontation of witnesses offered by the Government in proof of a crime. See U.S. CONST. amend. VI (granting a criminal accused the right to “be confronted with the witnesses against him” and “to have compulsory process for obtaining witnesses in his favor”); UCMJ art. 46 (2008) (granting the defense “equal opportunity to obtain witnesses”); MCM, *supra* note 9, RCM 703(b)(1) (implementing Article 46 of the UCMJ); *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990).

<sup>96</sup> A summary court-martial or the trial counsel of a special or general court-martial can issue subpoenas for the production of witnesses. MCM, *supra* note 9, R.C.M. 703(e)(2)(C). Subpoenas cannot compel civilians to travel outside the United States. *Id.* R.C.M. 703(e)(2)(A) discussion. Witnesses who are on active duty can be ordered to travel in lieu of subpoena. *Id.* R.C.M. 703(e)(1).

<sup>97</sup> *Id.* R.C.M. 703(e)(2)(G); *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001) (noting that the military judge’s powers to hold persons in contempt and to issue warrants of attachment are limited to circumstances when a subpoena was properly issued). Because a subpoena “may not be used to compel a civilian to travel outside the United States and its territories,” MCM, *supra* note 9, R.C.M. 703(e)(2)(A) discussion, the military judge at a combat zone court-martial has no real ability to compel or sanction civilian witnesses in the United States. See also 10th Mountain Div., 4th Brigade, After Action Review (OIF) 18 (2009) (“Civilian witnesses would often not appear to testify at trials.”)

necessary defense merits witness,<sup>98</sup> the military judge may have no other choice than to abate the proceedings.<sup>99</sup> The Government could propose stipulating to the witness's expected testimony in lieu of live testimony,<sup>100</sup> but the defense will usually have little incentive to agree, especially if the difficulty of producing the witness could delay or entirely thwart the court-martial.<sup>101</sup>

The "good military character" defense represents a powerful tool that can be used by an accused to pressure the command to back down from a combat zone court-martial. Given the prospect of the "good military character" defense and its associated witness production problems, combat commanders may be understandably reluctant to consider the court-martial option when they must address criminal allegations in their units.

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<sup>98</sup> Prior to the judicial expansion of the "good military character" defense, production of defense character witnesses was more limited. See *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985) (tempering the admissibility of military character evidence against the strength of the Government's case, the weakness of the defense's case, the materiality of the evidence, and the existence of suitable substitute evidence in the record of trial); *United States v. Vandelinder*, 20 M.J. 41, 45 (C.M.A. 1985) (emphasizing that affidavits could substitute for live "good military character" testimony).

According to the Drafters Analysis [to MRE 405(c)], this rule is required due to the world wide disposition of the armed forces which makes it difficult if not impossible to obtain witnesses—particularly when the sole testimony of a witness is to be a brief statement relating to the character of the accused. This is particularly important for offenses committed abroad or in a combat zone, in which case the only witnesses likely to be necessary from the United States are those likely to be character witnesses.

*Id.* Military Rule of Evidence 405(c), however, has not yet been considered in light of newer confrontation requirements in *Crawford v. Washington*, 541 U.S. 36 (2004), and its military progeny. Even before *Crawford*, military courts treaded lightly when considering whether to restrict live production of defense character witnesses. The affidavit emphasis in *Vandelinder* has not since been applied in military appellate opinions, and common trial practice has emphasized the right to use affidavits *in addition to* rights to live witness testimony. See, e.g., *United States v. McCommon*, WL 2997036 (A.F. Ct. Crim. App. Sept. 3, 2009); *United States v. Voda*, WL 190265 (A.F. Ct. Crim. App. Jan. 26, 2004). A return to the "binding affidavit" holding in *Vandelinder* would sensibly permit the defense to raise "good military character" without crippling the Government by requiring production of out-of-country character witnesses during deployments.

<sup>99</sup> UCMJ art. 46 (2008); MCM, *supra* note 9, R.C.M. 703(b)(1, 3), *id.* MIL. R. EVID. 804(a)(5).

<sup>100</sup> MCM, *supra* note 9, R.C.M. 811.

<sup>101</sup> A Marine judge advocate accurately noted the importance of this motivation during deployments. "In the end, defense will likely continue to require the government to produce necessary and relevant witnesses in person because it can be a successful tactic of taking away the focus of the trial counsel from preparing his presentation of the case." Major Nicole K. Hudspeth, *Remote Testimony and Executive Order 13430: A Missed Opportunity*, 57 NAVAL L. REV. 285, 303 (2009).

## B. Expert Witnesses

Expert witness requests also have the potential to derail deployed courts-martial. In general, an accused at court-martial may be entitled to government-funded expert assistance.<sup>102</sup> When seeking an expert, the accused must submit a request to the convening authority with a complete statement of the reasons why employment of the expert is necessary, along with the estimated cost of the expert's employment.<sup>103</sup> The convening authority must then decide whether to approve the request, deny the request outright, or deny the request but provide a substitute expert. If the convening authority denies the request, the military judge must decide whether the expert is relevant and necessary, and whether the Government has provided an adequate substitute.<sup>104</sup> As with other witnesses, the trial counsel arranges for personal production of the expert.<sup>105</sup>

For the Government to provide an accused with an expert witness in the combat zone, the first challenge is to find one. Local civilians in Afghanistan or Iraq may not have the desired American professional credentials or English language ability. While the military may have some experts among its ranks in the combat zone to provide an "adequate substitute," problems remain. First, a law restricting executive branch employees from serving as expert witnesses in cases against the United States may discourage military experts from undertaking this additional role.<sup>106</sup> Second, an accused may argue that the expert assistance he seeks requires independence from the military and an ability to openly criticize military practices; in that

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<sup>102</sup> UCMJ art. 46; MCM, *supra* note 9, R.C.M. 703(d); *United States v. Gonzalez*, 39 M.J. 459 (1994) (laying out the three-part *Gonzalez* test, whereby the defense must establish why the expert assistance is needed, what the expert assistance would do for the accused, and why the defense is otherwise unable to provide the evidence that the expert will provide); Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1 (offering defense counsel additional considerations for applying the *Gonzalez* test); *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006) (requiring that the accused show a reasonable probability exists that the expert would assist the defense and that denial of expert assistance would result in a fundamentally unfair trial). Indigence is not a factor for courts-martial for determining an accused's eligibility for government-funded expert assistance.

<sup>103</sup> MCM, *supra* note 9, R.C.M. 703(d).

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* Part III.A.

<sup>106</sup> 5 C.F.R. § 2635.805 (2010) states,

Service as an expert witness. (a) *Restriction*. An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest . . . .

In the Army, the Chief, Litigation Division can authorize the expert appearance of a government employee in a case against the United States. 5 C.F.R. § 2635.805(c) (2010).

case, a military expert may appear too conflicted or restrained to be an adequate substitute.

Without access to nearby experts, the Government may need to hire an expert in the United States, which presents problems for completing courts-martial expeditiously. Much time, effort, and expense may be needed to produce the expert; a typical description of this process came from a judge advocate who wrote that “arranging for expert witnesses to participate in courts-martial held in theater was a difficult and time-consuming process.”<sup>107</sup> Additionally, if the expert is a civilian, the court-martial must operate at the mercy of the expert’s availability, since the court lacks subpoena power over experts to enforce orders and trial appearances.<sup>108</sup>

Of course, these logistical concerns matter only if the expert request has merit; frivolous expert requests can be denied. For example, an accused charged with desertion will usually fare poorly in seeking a DNA expert. However, a caveat in military appellate opinions and court-martial rules seem to require a broad finding of “necessary and relevant” for at least one type of expert: those called to support a theory of partial mental responsibility.<sup>109</sup> In cases with specific intent elements, this theory permits the defense to present evidence that the accused did not or could not possess the mental intent to commit a crime.

In *Ellis v. Jacob*, an accused charged with the unpremeditated murder of his 11-year old son sought expert opinion evidence to rebut the element that he possessed the intent to kill or inflict great bodily harm at the time of the offense.<sup>110</sup> The defense wished to present expert testimony to show that because the accused had experienced “sleep

deprivation” and “pressure,”<sup>111</sup> he was psychologically impaired when he committed the crime.<sup>112</sup> The Court of Military Appeals agreed with the expert rationale and altered the landscape for expert witness production by holding that partial mental responsibility is a substantive defense that can negate the intent elements of specific intent crimes.<sup>113</sup>

With such generalized hardships as “sleep deprivation” or “pressure” permitted, nearly anyone charged with a specific intent crime in the combat zone would have an invitation to seek an expert. If defense counsel can articulate how stress, lack of sleep, or some other routine hardship resulted in a temporary psychological impairment, the accused could qualify for expert assistance with solid backing from military case law.

As a result, in a combat zone, the procedure of requesting expert assistance could become a defense negotiating tactic designed to win dismissal of charges or the granting of favorable treatment. As one unit noticed, “Whether it was the need for expert witnesses, the command’s reluctance to hold courts-martial while deployed, or the requests for transportation assets, etc., the attorneys at TDS fought to get their clients the best possible deal.”<sup>114</sup> Ultimately, these difficulties are likely to weigh heavily in a deployed commander’s analysis of whether to try cases.

#### IV. Effects of Non-Deployable Courts-Martial

The previous two parts described how combat zone courts-martial are fraught with difficulty and are thus largely avoided in practice. The looming question now is: so what? After all, the U.S. military continues to enjoy broad public confidence, evidenced by its repeated top standing in a poll of American public institutions,<sup>115</sup> so there is little public agitation for reform to more effectively punish military crime. It may seem harsh, unpatriotic, and unnecessary to emphasize shortcomings in judicial sanction against those who not only serve in the military, but who also serve in

<sup>107</sup> 101st Airborne OEF 2009, *supra* note 30, at 41.

<sup>108</sup> See *supra* note 96.

<sup>109</sup> Partial mental responsibility should not be confused with the affirmative defense of lack of mental responsibility, also known as insanity, which requires a severe mental disease or defect, a burden on the defense to prove the affirmative defense by clear and convincing evidence, and a possibility of findings of not guilty only by reason of lack of mental responsibility. See UCMJ art. 50a (2008); MCM, *supra* note 9, R.C.M. 916(k)(1). Other than the defense of lack of mental responsibility, a mental disease or defect cannot be used as an affirmative defense but can be used to negate an element of specific intent such as knowledge, premeditation, or intent. For a good overview of the development of the theory of partial mental responsibility in the military, see United States v. Axelson, 65 M.J. 501, 513–17 (A. Ct. Crim. App. 2007).

<sup>110</sup> 26 M.J. 90 (C.M.A. 1988); Lieutenant Colonel Donna M. Wright, “*Though This Be Madness, Yet There is Method in It: A Practitioner’s Guide to Mental Responsibility and Competency to Stand Trial*,” ARMY LAW., Sept. 1997, at 18, 25–27 (concluding that partial mental responsibility can allow the defense to present evidence of the accused’s mental condition for specific intent offenses without having to prove lack of mental responsibility); see also Major Jeremy Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers*, ARMY LAW., Dec. 2005, at 1, 19–23 (cautioning that the Army court instructions for partial mental responsibility have not changed to reflect the new case law in *Ellis* and changes to RCM 916(k)).

<sup>111</sup> *Ellis*, 26 M.J. at 91, 93.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> 82d Airborne Div., 3d Brigade Combat Team, Brigade Judge Advocate, After Action Report (OIF) 25 (4 Feb. 2010).

<sup>115</sup> In 2009, 82% of polled Americans stated that they had either “a great deal” or “quite a lot” of confidence in the military, the highest of any public or private institution, and very favorable compared to other institutions such as the presidency (51%), the medical system (36%), the criminal justice system (28%) or Congress (17%). *Gallup Poll: Major Institutions* (June 14–17, 2009), available at <http://pollingreport.com/institut.htm> (last visited 15 January 2010). The author credits Major General Charles J. Dunlap Jr. and Major Linell A. Letendre, both U.S. Air Force judge advocates, for pointing him to these polls, from their article, *Military Lawyering and Professional Independence in the War on Terror: A Response to Professor Luban*, 61 STAN. L. REV. 417, 437 (Nov. 2008).

combat. This part answers the “so what” question by exploring the strategic perils of court-martial frailty on deployments.

### A. Perceptions of Impunity

An insurgent leader once wrote an anger-laced list of complaints about a powerful foreign country that was occupying his country. Upset with the criminal behavior of the occupiers, he was especially incensed by their practice of whisking soldiers accused of heinous crimes back to their home country. For all he could tell, they were then exonerated in what he described as “mock trials.”

That man was Thomas Jefferson, and the grievances are memorialized in the American Declaration of Independence.<sup>116</sup> The circumstances surrounding America’s founding may be different, but the strategic consequences of fomented resentment towards perceived “double standards” of powerful foreign forces are highly relevant to current operations. In recent conflicts, the U.S. military regularly sent cases of serious misconduct away from the combat zone rather than court-martialing on-site.<sup>117</sup> When this happened, affected Afghans and Iraqis had little chance to ever hear about the cases again. Without information, they became likely to believe in a widespread practice of criminal exoneration, which altered perceptions of American legitimacy.

#### 1. Perceptions of Impunity in Afghanistan

In Afghanistan, the common practice of sending servicemember misconduct back to the United States had strategic impact. A prominent U.N. official, Philip Alston,

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<sup>116</sup> THE DECLARATION OF INDEPENDENCE para. 17 (U.S. 1776) (“For protecting them [British soldiers] by mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.”).

<sup>117</sup> An interesting area for further study, but beyond the scope of this paper, is an assessment of how outcomes differ for misconduct committed against foreign civilians that are tried in the United States compared to on deployment. A prominent scholar who studied the issue in seventeen instances—such as the United States after My Lai in Vietnam; Argentina’s “Dirty War”; and Belgian, Canadian, and Italian peacekeepers in Somalia—notes a consistent reluctance by states to fully pursue justice against their own soldiers in domestic trials. See Timothy L.H. McCormack, *Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their ‘Own Nationals’ for International Crimes*, in JUSTICE FOR CRIMES AGAINST HUMANITY 107 (Mark Lattimer & Philippe Sands eds., 2003). “Despite the rhetoric of a commitment to the principle of trying war crimes, the practice of states confirms glaring inconsistencies between those acts which are tried and those which are not—inconsistencies most readily explicable on the basis of an ‘us’ and ‘them’ mentality.” *Id.* at 107–08. Professor McCormack adds that the “domestic trial of members of a state’s own military forces for war crimes is the most politically sensitive of any domestic prosecution for international crimes.” *Id.* at 134. Could it be that on-site courts-martial are less susceptible to these pressures, since they are more likely to be convened for strategic military reasons, are away from domestic pressures, and have local victims nearby?

undertook a study of American responses to military misconduct in Afghanistan, and wrote that the inability of the Afghan people to learn the results of servicemember misconduct impaired the United States’ standing in Afghanistan. “During my visit to Afghanistan, I saw first hand how the opacity of the [American] military justice system reduces confidence in the Government’s commitment to public accountability for illegal conduct.”<sup>118</sup> He elaborates, “there have been chronic and deplorable accountability failures with respect to policies, practices and conduct that resulted in alleged unlawful killings, including possible war crimes, in the international operations conducted by the United States.”<sup>119</sup>

In speaking of both “opacity” and “accountability failures,” Mr. Alston suggests a weak sense of reckoning for military crime in Afghanistan—that interested observers could not attend courts-martial, read about disciplinary results in a local newspaper, or talk to a commander about the status of an investigation or case. When a Western-educated, English-speaking U.N. official with a research staff cannot find out results of misconduct from cases that have been sent back to the United States, the opportunities for ordinary Afghans to learn results of military misconduct are surely slimmer. In an Afghan society with ingrained beliefs about injustice at the hands of Western powers,<sup>120</sup> perceived “double standards” for servicemember crime likely fuel ambivalence or resentment about the American military mission.

#### 2. Perceptions of Impunity in Iraq

Based on its negotiating priorities, it appears that the Iraqi government was influenced to take action in response to perceptions that American military offenders went unpunished. During 2008 negotiations regarding the ultimate withdrawal of the American military, a top Iraqi objective was to obtain some jurisdiction over American crime.<sup>121</sup> Iraq even sent its top foreign minister to Japan to study terms for civilian prosecution of military crime contained in Japan’s Status of Forces Agreement with the

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<sup>118</sup> U.N. HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, PHILIP ALSTON: ADDENDUM: MISSION TO THE UNITED STATES OF AMERICA 24 (28 May 2009), A/HRC/11/2/Add.5, available at <http://www.unhcr.org/refworld/docid/4a3f54cd2.html> [hereinafter ALSTON REPORT] (last visited Jan. 15, 2010).

<sup>119</sup> *Id.* at 3.

<sup>120</sup> Dr. Amin Tarzi, Presentation to the 58th Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & Sch., Charlottesville, Va. (Feb. 19, 2010). Dr. Tarzi is a Senior Fellow at the Center for Advanced Defense Studies, focused on Afghanistan, and the Director of Middle East Studies at Marine Corps University in Quantico, Virginia.

<sup>121</sup> *Iraq Studied SOFA When Setting Trial Criteria for U.S. Servicemen*, KYODO WORLD SERV. (Japan), Mar. 27, 2009.

U.S. military.<sup>122</sup> In the final agreement, the United States agreed to cede limited criminal jurisdiction over American servicemember misconduct in Iraq.<sup>123</sup> At Iraq's insistence, this agreement also committed the United States to seek to hold military trials of servicemembers in Iraq rather than sending them away; when that was not possible, the United States agreed to assist Iraqi victims to attend trial in the United States.<sup>124</sup> To the extent that the actions of the Iraqi government reflected the will of its people, this agreement indicated Iraqi dissatisfaction with the American military's justice practices against its servicemembers.

The U.S. military was often unable to keep Iraqis informed about the status of cases when those cases were sent back to the United States for adjudication. An officer from a headquarters unit in Baghdad who was responsible for updating Iraqi government officials about the status of military cases in the United States wrote, "There was no central repository cataloging this information, particularly as trials sometimes occurred at home station many months after a unit redeployed. The RoL [Rule of Law] section had difficulty in obtaining updates in some cases, usually resorting to Google searches to try to obtain information."<sup>125</sup>

### 3. Others "Get It," but the United States Does Not

The United Nations has come to recognize the importance of trying cases where misconduct occurs. In 2003 and 2004, numerous allegations surfaced that U.N. peacekeepers in the Democratic Republic of the Congo (DRC; formerly known as Zaire) were involved in numerous acts of sexual exploitation against local civilians.<sup>126</sup> When the implicated peacekeepers were sent back to their home countries rather than tried by courts-martial in the DRC,

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<sup>122</sup> *Id.*

<sup>123</sup> Steven Lee Myers, *A Loosely Drawn American Victory*, N.Y. TIMES, Nov. 28, 2008, at A5 (describing the U.S.-Iraq strategic framework agreement and the American concession to cede criminal jurisdiction to the Iraqis for off-duty, off-base misconduct committed by American servicemembers).

<sup>124</sup> Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008.

As mutually agreed by the Parties, United States Forces authorities shall seek to hold the trials of such cases [involving American forces] inside Iraq. If the trial of such cases is to be conducted in the United States, efforts will be undertaken to facilitate the personal attendance of the victim at the trial.

*Id.* art. 12, ¶ 7.

<sup>125</sup> Multi-National Force-Iraq, Office of the Staff Judge Advocate (Rule of Law section), Individual Augmentee, After Action Report, October 2008–December 2008 (9 Feb. 2009).

<sup>126</sup> *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, ¶ 6, U.N. Doc A/59/710 (Mar. 24, 2005) (prepared by Prince Zeid Ra'ad Zeid Al-Husseini).

civilian dissatisfaction grew and may have endangered the peacekeeping mission.<sup>127</sup> In response, a comprehensive U.N. report on peacekeeping operations called for "on-site courts martial" among its top priorities.

An on-site court martial for serious offences that are criminal in nature would afford immediate access to witnesses and evidence in the mission area. An on-site court martial would demonstrate to the local community that there is no impunity for acts of sexual exploitation and abuse by members of military contingents. . . . Therefore, all troop-contributing countries should hold on-site courts martial. Those countries which remain committed to participating in peacekeeping operations but whose legislation does not permit on-site courts martial should consider reform of the relevant legislation.<sup>128</sup>

Strategic concern about perceptions that the military members enjoy criminal impunity has grown with America's largest military ally. Great Britain<sup>129</sup> has improved military prosecutions and increased public transparency of military trials in response to lessons learned in Iraq about the strategic setbacks of shipping crime home.<sup>130</sup> British lawmakers<sup>131</sup> and military doctrine writers<sup>132</sup> have each

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<sup>127</sup> *Id.* ¶ 10.

<sup>128</sup> *Id.* ¶ 35.

<sup>129</sup> The author thanks Lieutenant Colonel (Lt. Col.) Nigel Heppenstall of the British Army for helpful conversations about the British military tradition. At the time of writing, Lt. Col. Heppenstall was assigned as a British Exchange Legal Officer to CLAMO.

<sup>130</sup> Michael Evans & Frances Gibb, *Accused Troops Will Face More Robust Courts-Martial, Says Prosecution Chief*, TIMES ONLINE (U.K.), Jan. 2, 2009, available at <http://business.timesonline.co.uk/tol/business/law/article/5430038.ece> (describing the stance of the new top civilian in charge of British military prosecutions, Bruce Houlder, in calling for tougher prosecutions after a series of court-martial acquittals that were considered a setback for the British military in Basra, Iraq. In one of those, seven soldiers from the Queen's Lancashire Regiment and Intelligence Corps were tried by court-martial in England for their involvement in the death of Iraqi detainee Baha Mousa in 2003 in Basra, resulting in one conviction.)

<sup>131</sup> HOUSE OF COMMONS DEFENCE COMMITTEE, IRAQ: AN INITIAL ASSESSMENT OF POST-CONFLICT OPERATIONS, VOLUME II (Sixth Report of Session 2004–05) (U.K.) (23 June 2004):

From the point of view of justice being seen to be done and to winning the confidence of the Iraqi people, I think it would be absolutely wrong to say all our courts martial are going to be held somewhere in the South of England that I do not even know where, being a Scotsman, never mind someone from outside Basra, and I think that is the danger—that we would lose the confidence of the people.

*Id.* at 17 (statement of Mr. Frank Roy, Defence Committee).

<sup>132</sup> ARMY FIELD MANUAL VOLUME 1 PART 10, COUNTERING INSURGENCY, at 7-B-3 (draft) (U.K.) (Apr. 2009) ("It is essential that the host nation

emphasized that transparent prosecutions conducted near where crime occurs help the military gain the confidence of the foreign population. In response to allegations that British soldiers beat and killed an Iraqi detainee named Baha Mousa in Basra, Iraq, the British set up a website in Arabic (the predominant language spoken in Basra), with translations of the proceedings from the public inquiry.<sup>133</sup>

In the United States, however, no American political or military leaders have emphasized the need for on-site courts-martial. American military guidance on venue expresses no preference for trying wartime misconduct where it occurs. “Given the maturity of the Afghan and Iraqi theaters, commanders now have a choice of whether to conduct courts-martial in theater or at home station.”<sup>134</sup> This means that court-martial decisions are left to logistical questions of where it is “easier” to conduct them. The British emphasis on this issue, and the American lack of emphasis, could be a consequence of the United Kingdom’s collective understanding of the ramifications of military misbehavior after its decades of experience in Northern Ireland.<sup>135</sup> Or perhaps the losing side of the American Revolution better understands the consequences of sending misconduct back to the home country for perceived “mock trials.”

## B. How Unpunished Crime Can Thwart Counterinsurgency Efforts

Counterinsurgency (COIN) is thought of as a competition of legitimacy; the insurgent or counterinsurgent who sways and holds the support of the population wins. “Both insurgents and counterinsurgents are fighting for the support of the populace.”<sup>136</sup> Crimes committed by combatants directly undermine that side’s legitimacy. “Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.”<sup>137</sup> When these misdeeds are magnified, COIN success is

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population does not develop a perception that British service personnel are being treated with impunity.”)

<sup>133</sup> See BAHAMOUSAINQUIREY, <http://www.bahamousainquirey.org/index.htm> (last visited Feb. 23, 2010) (including a link to an Arabic language version of the website).

<sup>134</sup> FORGED IN THE FIRE, *supra* note 3, at 311.

<sup>135</sup> As a result of their involvement in Northern Ireland from 1969 to 2007, the British have achieved an admirable factual accounting of the interplay of terrorist incidents, civilian deaths, news reporting, and soldier misconduct. This could serve as a useful groundwork for other studies about the operational and strategic effects of military misconduct. See DAVID MCKITTRICK ET AL., LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED THROUGH THE NORTHERN IRELAND TROUBLES (2d ed. 2004).

<sup>136</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-160 (15 Dec. 2006) [hereinafter FM 3-24].

<sup>137</sup> *Id.* para. 1-132.

imperiled. “Isolated misdeeds by junior soldiers or small units can adversely affect a theater of war, and undo months of hard work and honorable sacrifice.”<sup>138</sup> As an example, Army COIN doctrine describes the consequences of French military indiscipline against Algerian insurgents from 1954 to 1962: “Illegal and immoral activities made the counterinsurgents extremely vulnerable to enemy propaganda inside Algeria among the Muslim population, as well as in the United Nations and the French media.”<sup>139</sup> In short, COIN magnifies misconduct.

Given the strategic nature of misconduct in COIN, having a deployable justice system that allows for punishment and deterrence becomes even more important. A leading military law scholar explains the linkage of deployable justice and the promotion of good behavior:

By having a justice system that can travel with the forces into combat and other operations, a military encourages its forces to respect the rule of law. A military force that respects the rule of law garners respect and trust from the world community. This trust and respect can certainly carry over to world opinion about the legitimacy of the military operations.<sup>140</sup>

When the justice system cannot follow the force, misconduct lacks a formal deterrent. The following paragraphs describe some of the risk factors present in our force that, if left unchecked by a meaningful regime of sanction, may threaten COIN efforts.

Soldiers with criminal tendencies can undermine COIN efforts, especially if they can linger without a mechanism for formal sanction. In the past decade, relaxed recruiting standards permitted large numbers of gang members<sup>141</sup> and prior felons<sup>142</sup> into the American military. An Army study

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<sup>138</sup> John Nagl & Paul Yingling, *New Rules for New Enemies*, ARMED FORCES J., 25, 25 (Oct. 2006).

<sup>139</sup> FM 3-24, *supra* note 136, at 7-9.

<sup>140</sup> Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?*, 16 TUL. J. INT’L & COMP. L. 419, 425 (2008).

<sup>141</sup> See, e.g., NAT’L GANG INTELLIGENCE CTR., GANG-RELATED ACTIVITY IN THE US ARMED FORCES INCREASING (12 Jan. 2007) (assessing the prevalence of gang members in the military as a threat to national security; noting that gang members join the military to receive military training, to access weapons and explosives, and to avoid incarceration); *Gangs in the Military* (CBS television broadcast July 29, 2007), available at <http://www.cbsnews.com/video/watch/?id=3107605n&tag> (noting the rise of gang violence within the military; showing evidence of gang member presence among U.S. servicemembers in Iraq; and reporting that the Army Criminal Investigation Division increased its number of gang-related crime investigations from nine in 2004 to sixty-one in 2006).

<sup>142</sup> See, e.g., Lizette Alvarez, *Army Giving More Waivers in Recruiting*, N.Y. TIMES, Feb. 17, 2008, at A1 (noting that waivers granted to Army recruits with criminal backgrounds grew from 4918 in 2003 to 8129 in

showed that those who entered on “moral waivers” were more likely to engage in misconduct than other recruits.<sup>143</sup> Likewise, a leading military thinker asserts that this trend correlates to higher rates of military misconduct: “When enlistment qualifications go down, that means discipline rates go up.”<sup>144</sup> One unit noted a tangible link between moral waivers and combat misconduct: “Our BCT experience was that the vast majority of downrange CMs [courts-martial] were for people with moral waivers on their enlistments.”<sup>145</sup>

Noting that COIN is a competition for the support of the civilian population, military forces must be able to deter and discipline those whose misconduct is directed at civilians. In an Army medical study conducted between 2005 and 2007, about ten percent of 1844 Marines and Soldiers surveyed in Iraq stated that they had mistreated non-combatants and damaged civilian property when it was not necessary to do so.<sup>146</sup> It is admittedly difficult to determine

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2006, and that recruits with criminal histories made up 11.7% of Army recruits in 2006); Lizette Alvarez, *Army and Marine Corps Grant More Felony Waivers*, N.Y. TIMES, Apr. 22, 2008, at A21 (describing how the Army doubled the number of felony waivers granted in 2007, and how a total of 18% of Army recruits received either felony or misdemeanor conduct waivers in fiscal year 2007).

<sup>143</sup> See C. Todd Lopez, *DoD Sets Joint Standards for Enlistee Waivers*, SOLDIERS, Oct. 1, 2008, at 21 (describing an Army study of enlistees from 2003 to 2006 that compared enlistees with moral waivers to those who did not require a waiver). The study found that those who entered on waivers had higher rates of misconduct and desertion than other enlistees. It qualified those findings by emphasizing that enlistees with moral waivers re-enlisted at higher rates, scored higher on aptitude tests, and earned proportionally more valor awards and combat badges. Cf. Knickerbocker, *supra* note 5, at 1 (providing a less positive assessment of the effects of allowing criminal waivers).

Waiving rules against recruiting men and women with criminal records is leading to a substantial rise in the number of gang members wearing uniforms and getting trained to use military weapons. Put them in a war zone where death is common and life cheap—that’s a real recipe for wanton killing.

*Id.* (quoting retired Army Colonel Dan Smith, author and commentator on military affairs).

<sup>144</sup> Knickerbocker, *supra* note 5, at 1 (quoting Gary Solis, author, frequent commentator on military affairs, and Adjunct Professor at Georgetown University Law Center).

<sup>145</sup> E-mail from Captain Eric Hanson, to author (Mar. 21, 2010 03:51 EST) (on file with author). Captain Hanson was the trial counsel of the 173d Airborne Regiment in Afghanistan for fifteen months from 2007 to 2008. Captain Hanson believes that his Regiment conducted over half of all Afghanistan courts-martial during his time there. *Id.* See also Hanson, *supra* note 4.

<sup>146</sup> MENTAL HEALTH ADVISORY TEAM (MHAT) IV OPERATION IRAQI FREEDOM 05–07, FINAL REPORT, Nov. 16, 2006, available at [http://www.armymedicine.army.mil/reports/mhat/mhat\\_iv/MHAT\\_IV\\_Report\\_17NOV06.pdf](http://www.armymedicine.army.mil/reports/mhat/mhat_iv/MHAT_IV_Report_17NOV06.pdf) (containing the results of interviews of 1406 Soldiers and 438 Marines in Iraq on topics such as mental health, well-being, battlefield ethics and suicide prevention); Major General Gale Pollock, Transcript of News Conference, DoD News Briefing with Assistant Secretary Casscells from the Pentagon, May 4, 2007, available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3958> (summarizing the Mental Health Advisory Team’s final report).

if the percentage of American forces now in Iraq and Afghanistan would poll similarly, but even a smaller percentage represents a strategic wild card with the potential to undermine military legitimacy and sour a host population’s goodwill. The need for a deterrent mechanism is powerful in such circumstances, as Soldiers “need to see the results of misconduct.”<sup>147</sup>

The Burger King Theory<sup>148</sup> raises a thorny problem concerning the impact of Soldier misconduct. When Soldiers stay on large “Burger King bases,” they spend much of their time among other Americans and away from the local population. As a result, much of the crime they commit does not affect the citizens of the host nation. On the other hand, when they are stationed away from “Burger King bases” and on smaller outposts, they spend more of their time interacting with local citizens. For Soldiers who spend more time with local citizens, the criminal activity they commit will have a proportionally greater effect on the local population. However, these are the same Soldiers who are *least likely* to face court-martial because they are away from large bases.

When counterinsurgent forces commit misconduct against civilians, the local commander may be able to salvage goodwill by communicating effectively with the affected civilian community. A leading thinker on modern COIN theory explains that after U.S. forces commit misconduct, the U.S. commander must address locals with “a clear and focused IO [information operations] campaign explaining exactly what is going on.”<sup>149</sup> Army doctrine cites the ability to “manage information and expectations” as the top contemporary imperative of COIN.<sup>150</sup>

However, several impediments may hinder the commander’s ability to manage information about military misconduct. First, a case that is sent back to the United States will often fall under a different commander, and the original commander cannot then attempt to influence the new commander on the disposition of the case.<sup>151</sup> Second, adjudicating misconduct at a court-martial away from the combat zone may be neither swift nor certain. One Marine

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“[A]pproximately 10 percent of soldiers and Marines report mistreating non-combatants or damaging property when it was not necessary. Only 47 percent of the soldiers and 38 percent of Marines agreed that non-combatants should be treated with dignity and respect.” *Id.*

<sup>147</sup> CLAMO Interview with Major Robert Resnick & Captain Charles Pritchard, 3d Infantry Division, in Charlottesville, Va. (Nov. 20, 2003) quoted in FORGED IN THE FIRE, *supra* note 3, at 290.

<sup>148</sup> See *supra* Part II.D.

<sup>149</sup> E-mail from Major Niel Smith, to author (Oct. 7, 2009 20:01 EST) (on file with author). Major Smith has published four articles in *Small Wars Journal* on COIN strategy.

<sup>150</sup> FM 3-24, *supra* note 136, para. 1-138.

<sup>151</sup> United States v. Newlove, 59 M.J. 540 (A. Ct. Crim. App. Aug. 20, 2003).

judge advocate described the delays that plagued stateside courts-martial of combat zone misconduct as follows:

From Camp Pendleton, trial counsel and defense counsel started from scratch with a very complex case in which they lacked basic familiarity with the unit's mission, enemy activities in the area, or other important aspects of the environment in which the misconduct had taken place. The eight cases ultimately required more than fourteen months to prosecute. . . . Similarly, the Haditha case still remains unresolved, more than two years since first being brought to light.<sup>152</sup>

Even if the commander decides that a case is important enough to try in country, he still may not be able to assuage the affected community if he cannot talk about the case. An impairment on his ability to talk about the case is the judicial prohibition against unlawful command influence (UCI). "Commanders at all levels must be mindful of their role in our system of justice and be careful not to comment inappropriately on pending cases in their command."<sup>153</sup> This restriction may limit a commander's messages to impersonal communiqués such as, "we will investigate all allegations of misconduct," or, "Article 32 is a procedure designed to . . ." rather than impressing his ability to control his forces and address local concerns.<sup>154</sup>

One example of how the UCI doctrine proved to be a strategic detriment was its role in delaying reporting of the Abu Ghraib abuse case in Iraq in 2004. "Ironically, it was caution about unlawfully influencing the military justice system that led to the delay in senior officials' appreciating the extent of the Abu Ghraib abuse."<sup>155</sup> As an aspiration, commanders should be mindful of UCI principles but should also be able to candidly discuss civilian concerns on deployments without the need to have their attorney at their side for fear of UCI violations. The proper litmus test should be whether commanders feel unduly constrained in

answering the question "What are you going to do about this?" when posed by an affected local. The UCI doctrine's muzzle effect on command communications appears to be a contributor to the military's poor report card on communicating with affected locals about the status of military crimes in Afghanistan and Iraq. "[T]he military justice system fails to provide ordinary people, including United States citizens and the families of Iraqi or Afghan victims, basic information on the status of investigations into civilian casualties or prosecutions resulting therefrom."<sup>156</sup>

## V. Proposals to Promote Judicial Goals in the Combat Zone

*They constantly try to escape  
From the darkness outside and within  
By dreaming of systems so perfect that no one  
will need to be good.*<sup>157</sup>

Finding that courts-martial in combat zones are prohibitively difficult and that the weak system of deployed justice has negative strategic effects, the remaining issue is how to fix the problem. This part explores a range of possibilities.

### A. Emphasis on the Need to Try Cases Where Crime Occurs

One solution is for military and political leaders to emphasize the importance of trying cases in the combat zone whenever practicable, as the British learned in Iraq<sup>158</sup> and the United Nations learned in the Congo.<sup>159</sup> This can be done at little cost by judge advocates, commanders, the media, Congress, and the President. Emphasis alone may have a significant effect. A change in military doctrine would help embolden this emphasis.

### B. Communicating about Trials

Admittedly, not every court-martial for combat zone misconduct can be tried in the combat zone. When cases must be tried in the United States, such as when crimes occur at the end of a unit's combat tour as the unit prepares to redeploy, the status of the proceedings must be effectively communicated to the affected population. The British Baha Mousa public inquiry,<sup>160</sup> which used websites with the proceedings translated into the language of the affected

<sup>152</sup> Hackel, *supra* note 4, at 243.

<sup>153</sup> Lieutenant Colonel Mark L. Johnson, *Unlawful Command Influence—Still with Us*, ARMY LAW., June 2008, at 104, 107.

<sup>154</sup> Any suggestion that this article advocates unlawful command influence ought to be quickly dispelled. The UCI doctrine rightly protects against bad-faith command interference in judicial proceedings. The prohibition on UCI protects servicemembers, but so too do HESCO barriers, Kevlar helmets, and M1A1 tanks—things that, when necessary to win the counterinsurgency fight, have been set aside or modified.

<sup>155</sup> MARK MARTINS, PAYING TRIBUTE TO REASON: JUDGMENTS ON TERROR, LESSONS FOR SECURITY, IN FOUR TRIALS SINCE 9/11, at 124 (2008). Martins is currently a brigadier general (BG) in the U.S. Army's Judge Advocate General's Corps. Brigadier General Martins draws a different conclusion than the author about the UCI lessons from Abu Ghraib, saying that the UCI doctrine should not be diminished. His book instead urges military leaders to place more emphasis on accurate investigations and timely reporting. *Id.*

<sup>156</sup> ALSTON REPORT, *supra* note 118, at 2.

<sup>157</sup> Excerpt from T. S. Eliot, *Choruses from "The Rock"* (1934), in T.S. ELIOT, COLLECTED POEMS 1909–1962 (1964).

<sup>158</sup> *Supra* Part IV.A.3.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

population, should be the guiding example for American reform. The Government should be required to perform additional duties for stateside courts-martial of combat zone crimes that affect foreign civilians, such as establishing websites with trial information in the appropriate foreign language and granting a broader right for foreign persons to travel to the United States to observe trial proceedings.

Instituting these changes would have a twofold effect. First, affected foreign persons would gain a meaningful way to follow cases in person or on the Internet. Second, the added burden imposed for trying cases stateside would incentivize trying cases where misconduct occurs. Although effective communication about wartime misconduct is a strategic imperative and not a judicial one, these requirements could be most easily implemented by amending service military justice regulations. A presidential executive order could induce these changes not just for courts-martial, but also for similar prosecutions conducted in the federal courts.

### C. Remove the Judges from the Code Committee

The court-martial troubles of the past decade of combat operations raise a reasonable question: Has the UCMJ kept up with the nature of modern military operations? The statute has not been adjusted at all to reflect any lessons learned from Afghanistan or Iraq. Who should be the impetus for such change?

Surprisingly, the group tasked by Congress to annually recommend changes to the UCMJ has not done so in nearly thirty years. The Code Committee, which consists of the judges of the Court of Appeals for the Armed Forces (CAAF), the individual service judge advocates general (JAGs), and two members of the public appointed by the Secretary of Defense,<sup>161</sup> is tasked in UCMJ article 146 to conduct an “annual physical exam”<sup>162</sup> of the military justice system and to report its recommendations to Congress. However, reasoning that it should not intermix the legislative role of recommending statutory changes with the judicial duties of the CAAF judges on the committee, the Code Committee has not furnished recommendations to Congress since 1983.<sup>163</sup>

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<sup>161</sup> UCMJ art. 146 (2008).

<sup>162</sup> H.F. “Sparky” Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 252 (2005).

<sup>163</sup> This is based on conversations the author had with two CAAF judges and CAAF senior staff over the course of the spring of 2010. This reason for a lack of recommendation is never listed in its annual reports, which consist mainly of appellate case statistics and reports from the individual service Judge Advocate Generals.

Since the Code Committee has failed to act, private groups such as the Cox Commission<sup>164</sup> have tried to fill the void by offering a “more comprehensive physical including blood work and an EKG”<sup>165</sup> in 2001 and 2009. While private groups may do laudable work and draw public and congressional attention to problems that deserve legislative focus, there are limits to relying on them exclusively for stewardship of the UCMJ. For example, because these groups are non-governmental, they lack the expertise and insights of active duty military personnel familiar with recent applications of the UCMJ in combat.

To resolve this impasse, Congress should modify the membership of the Code Committee to exclude the CAAF judges. This would leave the Committee in the hands of the service JAGs and the two members of the public appointed by the Secretary of Defense. Freed from the CAAF judges’ worries about intermixing legislative and judicial roles, the service JAG-controlled Code Committee would be free to draft responsive annual recommendations to Congress about how to change the UCMJ.

### D. A Reconsideration of Certain Rights

As noted in Parts II and III, the biggest obstacle to deployed justice was the requirement to produce witnesses from outside the combat zone. The pressing priority for the Code Committee (or other body tasked to recommend reform) is to consider the circumstances when alternatives to live witness production—including video teleconferencing and affidavits—would still ensure fair trials. Modifying confrontation requirements for units serving in combat zones is essential to the goal of revitalizing deployed justice. It is unrealistic for the military to unthinkingly follow confrontation developments from civilian courts that were never intended to apply to the military. Testimony by deposition and relaxed confrontation rules were the norms for American courts-martial from the time of the Founding Fathers in the Revolutionary War until after the Civil War,<sup>166</sup> so history can help guide the task of breaking the lockstep between 6th Amendment confrontation requirements and rights in courts-martial.

Similarly, the curtailment of rights to civilian counsel should be considered for combat zone courts-martial. Like the production of witnesses, the logistical challenge of bringing a private attorney in the United States to the combat

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<sup>164</sup> Information on the Cox Commission and its reports is available at [http://www.wcl.american.edu/nimj/cox\\_commission.cfm](http://www.wcl.american.edu/nimj/cox_commission.cfm) (last visited Mar. 5, 2010).

<sup>165</sup> Gierke, *supra* note 162, at 252.

<sup>166</sup> Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 282–84 (1958).

zone can significantly delay a case.<sup>167</sup> Appropriately limiting requests for civilian counsel in theater would decrease logistical and administrative delays, and would also put a positive spotlight on the professionalism and abilities of Trial Defense Services. A recent proposal, which argues for granting general court-martial convening authorities the ability to abrogate an accused's statutory right to civilian counsel under limited circumstances, offers a useful blueprint of how to implement this.<sup>168</sup>

#### E. Non-Judicial Punishment

A solution to promote judicial goals in areas largely beyond current judicial reach is to strengthen the military commander's non-judicial punishment (NJP) powers in the combat zone. This NJP authority is found in Article 15(a) of the UCMJ. Non-judicial punishment covers minor offenses, allows for certain minor punishments short of confinement,<sup>169</sup> and does not result in a criminal conviction or discharge from the military. It "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction."<sup>170</sup>

Article 15(a) permits servicemembers to refuse NJP and instead demand trial by court-martial, with one exception: when attached to or embarked in a vessel.<sup>171</sup> This exception

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<sup>167</sup> See Major John Brooker, *Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel*, ARMY LAW. (forthcoming Nov. 2010).

<sup>168</sup> *Id.* Major Brooker proposes "Precision-Targeted Abrogation," where a general court-martial convening authority in a combat zone can deny an accused's request for civilian counsel in certain circumstances. *Id.*

<sup>169</sup> Maximum punishments, when imposed by a commander in the rank of major or higher, include correctional custody for thirty days, forfeiture of half pay per month for two months, reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction (more restricted for grades E5 and above), extra duty for forty-five days, and restriction for sixty days. UCMJ art. 15(b)(2)(H) (2008).

<sup>170</sup> UCMJ art. 15; MCM, *supra* note 9, pt. V (Non-Judicial Punishment Procedure).

<sup>171</sup> The success of the U.S. Navy through decades with the "vessel exception" should temper any notion that binding NJP will widely imperil servicemember morale. The Navy has historically enjoyed strong success with recruiting and retention; in the last few years, a new program formed to fill a high demand for Soldiers from a surplus of Sailors. See Samantha L. Quigley, "Blue to Green" Program Hits Milestone, MILITARY.COM, Jan. 25, 2007, <http://www.military.com/NewsContent/0,13319,123279,00.html>. Even before this "Blue to Green" program, Navy recruiting and retention were strong. See Journalist First Class Sonja Chambers, *Navy Recruiting Successful in Manning the Fleet*, NAVY.MIL, Oct. 13, 2004, [http://www.navy.mil/search/display.asp?story\\_id=15465](http://www.navy.mil/search/display.asp?story_id=15465). But see Major Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57 (1996). Colonel Sullivan, a leading military justice scholar and author of the CAAFlog blog (<http://www.caaflg.com>), makes two main points in arguing to scrap the "vessel exception": first, potential exists for commanders to abuse binding NJP, and second, in fairness, servicemembers embarked on ships should not enjoy fewer rights than others who can refuse

is logical; it makes little sense to allow servicemembers to refuse NJP in places where courts-martial cannot be performed, such as on a ship. Applying the same logic, another place where courts-martial largely cannot be performed is in the combat zone. I propose that servicemembers either embarked on a vessel or serving in a combat zone should not have the option to reject NJP and demand court-martial. In such circumstances, NJP should be binding. The relevant sentence of Article 15(a), with the proposed addition italicized, would state:<sup>172</sup>

However, except in the cases of a member attached to or embarked in a vessel, *or entitled to pay for hostile fire or imminent danger*, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.

The Navy's approach to NJP (called "captain's mast") emphasizes its relationship to discipline, and, ultimately, the performance of military missions. A naval historian compared the Navy's approach to the Army's as follows:

The Navy reposed special faith in its ships' captains and gave them the power to discipline their crews in order to carry out assigned missions. . . . Navy captain's mast resembled a trial. The commander called witnesses, heard evidence, and interviewed the accused at a formal hearing set aside for the purpose. When satisfied that he knew the facts, he handed down a finding and awarded a punishment. . . . Although the Army treated NJP like an administrative task, it permitted appeal from this utterly nonjudicial affair to a court-martial, which had the power to

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NJP. The second point would be remedied (though not in the way the author intended) by a more expansive NJP regime in which any servicemember, not just those on ships, is bound to NJP when courts-martial are not feasible. The article encourages, among other alternatives to the "vessel exception" for NJP, the commander's ability to conduct administrative separation boards to separate servicemembers with the possible stigma of an other-than-honorable discharge. *Id.* at 102. However, the article does not compare the fairness, effect on morale, or collateral consequences of these separation procedures to NJP with the "vessel exception." Thus, the article seems to suggest that firing more employees with stigma attached is more just than being able to stay on the job but unable to veto one's own demotion.

<sup>172</sup> This could most easily be done by linking binding NJP to receipt of special pay for hazardous or hardship duty. See U.S. DEP'T OF DEF., REG. 7000.14-R, VOLUME 7A: MILITARY PAY POLICY AND PROCEDURES—ACTIVE DUTY AND RESERVE PAY IN FINANCIAL MANAGEMENT REGULATION (3 May 2005). This way, there is no ambiguity as to whether turndown rights apply in certain places, such as the Kuwait City airport—if the unit personnel or finance section confirms that the deployment pay provisions apply, then NJP is binding.

hand down a federal conviction. But one of the reasons the Navy refused to grant the right of election was that it considered mast a disciplinary matter, not a criminal one, and therefore not suitable for trial by court-martial.<sup>173</sup>

The idea of binding NJP may seem unusual to Soldiers who have never served on ships. Marines, on the other hand, have experience with both vessel service and ground combat deployments. One Marine judge advocate from Iraq noted the advantages of applying binding NJP to the combat zone.

A sailor deployed on the USS Arleigh Burke for local operations for two weeks off the coast of Virginia (as routine as it gets for the Navy) cannot refuse NJP, but a Marine in an infantry battalion in Al Qaim [Iraq], 150 miles from the nearest trial counsel or military judge, can refuse NJP and tie the hands of the commander to administer discipline.<sup>174</sup>

Deployed Army commanders similarly often have their hands tied over NJP due to court-martial frailty. One unit explained the dilemma created by the right to refuse NJP in a combat zone saying, “Some Soldiers requested trial by court-martial instead of accepting an Article 15. Commanders found themselves in an awkward position, i.e. prefer charges or administratively separate the Soldier.”<sup>175</sup>

Logically, servicemembers’ refusal of NJP should increase where the possibility of court-martial is remote, and the recollection of two experienced TDS attorneys confirms this motivation. One said he advised clients to turn down

NJP “up to ten times a month”<sup>176</sup> and “more than in garrison,”<sup>177</sup> while the other wrote, “I advised turning down Art [Article] 15s all the time in Iraq. . . . It was the deployed environment that caused such recommendations.”<sup>178</sup>

Non-judicial punishment can still thrive when away from Burger King bases. Recall that in Afghanistan in 2009 American forces were spread out over two hundred bases and outposts. Of those two hundred, only one had a courtroom and resident trial defense attorneys (Bagram Air Base), and only nine had judge advocates. On the other hand, all two hundred likely either had commanders present or were regularly visited by commanders. With this broader coverage, NJP represents a realistic option for addressing routine wartime disciplinary infractions. However, it is a less useful option if any offender has the power to wholly veto it. In such circumstances, the decision to discipline should rest with commanders, not offenders.

Granting the commander extra NJP power may also serve as an opportunity to create checks on potentially abusive NJP powers. One such safeguard could include a revival of servicemembers’ right to seek redress against a commander under Article 138 of the UCMJ.<sup>179</sup> A provision in one Army regulation has encroached impermissibly on Soldiers’ Article 138 rights by prohibiting its use for courts-martial and NJP.<sup>180</sup> As a result, Article 138 has become nearly extinct; only 21 Article 138 complaints were made in

<sup>173</sup> WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 123–24 (1973). In the same section, Dr. Generous also describes how the Navy successfully sought to retain the “vessel exception” when the UCMJ was enacted in 1950. The Army continued the trend identified by Dr. Generous of treating NJP as a form of judicial proceedings, going as far in 2005 as changing the NJP standard of proof to the judicial “beyond a reasonable doubt.” See U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-16 (16 Nov. 2005); Captain Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, ARMY LAW., Nov. 2005, at 28. Not only has the Army tampered with commander’s NJP abilities by imposing a legalistic standard of proof, they also have impermissibly limited commander’s statutory NJP powers. For example, the UCMJ authorizes commanders in the rank of Major or above to reduce Soldiers in paygrades E5 and above by two grades, but the promulgating Army regulation limits such commanders to only a one grade reduction. See UCMJ art. 15 (2008) and AR 27-10 *supra* note 173, at tbl.3-1.

<sup>174</sup> Lieutenant Colonel R. G. Bracknell, Staff Judge Advocate, Regimental Combat Team 5, U.S. Marine Corps, After Action Report (OIF) 11 (7 Aug. 2008).

<sup>175</sup> 4th Infantry Div. (Mechanized), 4th Combat Aviation Brigade, After Action Report (OIF), June 2008–June 2009, at 8 (28 Aug. 2009).

<sup>176</sup> Interview with Major Isaac Sprague, U.S. Army Trial Defense Serv. Attorney in Kuwait and Iraq from May 2008 to July 2009, in Charlottesville, Va. (Feb. 18, 2010).

<sup>177</sup> *Id.*

<sup>178</sup> E-mail from Ryan Wood, to author (Aug. 16, 2010 20:47 MST) (on file with author). Mr. Wood is a former U.S. Army Trial Defense Service officer who served in Iraq from Jan. 2007 to Jan. 2008.

<sup>179</sup> UCMJ art. 138 (2008) provides,

Complaints of Wrongs. *Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.*

*Id.* (emphasis added).

<sup>180</sup> AR 27-10, *supra* note 173, para. 20-5. “For many adverse actions, however, there are other, more specific channels and procedures to ensure the Soldier has an adequate opportunity to be heard. Those specific procedures usually are more effective and efficient for resolving such matters, and Article 138 procedures should neither substitute for, nor duplicate, them.” *Id.*

the last reporting year, 2008.<sup>181</sup> The Army justifies restricting this statutory right by claiming that Article 138 remedies are duplicative of military justice remedies.<sup>182</sup> However, this justification fails a plain language analysis: Congress included Article 138 in the same military justice statute that governed courts-martial and NJP, so since there is no stated limitation, Article 138 was designed to co-exist with judicial and NJP rights. The Army's justification also fails because Article 138 provides a specific statutory right to redress grievances to the GCMCA with a follow-on report to the civilian service Secretary. Since military justice procedures lack such a remedy,<sup>183</sup> Article 138 is never duplicative of military justice remedies. Article 138 may prove especially useful for checking abuse of NJP, which lacks the record of trial and detailed appellate review of courts-martial.<sup>184</sup> This remedy must be measured against the additional burden it would create, but the most appropriate way to temper an overly burdensome law is to change it, not to ignore it.

Another check is needed, and could be created, for expanded NJP against non-commissioned officers. The Army's regulation governing NJP requires that the record of NJP be automatically filed in the permanent section of a Soldier's records when that Soldier is in the grade of E5 (Sergeant) or higher.<sup>185</sup> Out of fairness, all NJP could be filed locally and retained for two years when the NJP is non-elective. If a commander wants the record of NJP included in a Soldier's permanent file, the commander should be required to allow the right to decline NJP and demand court-martial. A change to the Army regulation could quickly fix this.

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<sup>181</sup> ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES §§ 3, 21 (2008) (Report of The Judge Advocate General of the Army).

<sup>182</sup> For a trenchant analysis of Article 138 and the history of military rights of redress, see Captain Abraham Nemrow, *Complaints of Wrong Under Article 138, Uniform Code of Military Justice* 2 MIL. L. REV. 43 (1958). The one problem with the article is its dismissiveness of the broad redress rights contained in the UCMJ and insistence that service regulations should accord redress rights similar to those in the older Articles of War, which the author clearly favored. In so doing, the article provided a scholarly justification for the Army to promulgate a regulation that circumvented the radically broader rights in the then-new UCMJ. As a recent Secretary of Defense may have cautioned, "You go to war with the Article 138 you have, not the one you want."

<sup>183</sup> This should not be confused with discretionary service Secretary review of approved court-martial sentences. See UCMJ art. 74 (2008). Service Secretary review of court-martial results is rare. Non-judicial punishment results often remain at even lower levels, never reaching anywhere near the review level of even the general court-martial convening authority.

<sup>184</sup> Captain William P. Greene, Jr., Article 138: Fact or Fiction? (Apr. 1974) (unpublished manuscript) (on file at The Judge Advocate Gen.'s Legal Ctr. & Sch. Library, Charlottesville, Va.). The article notes examples from Vietnam where Soldiers alleged racism in NJP administration. Article 138, the article argues, can be a meaningful remedy for abusive NJP, which lacks the formal records and process of courts-martial. *Id.* at 23-25.

<sup>185</sup> AR 27-10, *supra* note 173, para. 3-6b (16 Nov. 2005). This author credits Lieutenant Colonel Dan Froehlich for this idea.

## VI. Conclusion

Imagine the court-martial system, in all its aspects, personified as a Soldier. A venerable veteran with a long record of service, this Soldier received high marks at his duty stations in the United States, Germany, and Korea. He applies exacting standards to his work, and some even say he is better at his job than any of his civilian counterparts. Although he is a highly specialized Soldier who does not train to directly engage and kill the enemy, his job nonetheless is critical to the military's success in combat.

Despite his successes at his home stations, he has struggled on previous deployments. He had a tough time adapting to the austerity and lifestyle of the combat zone and could not leave the large bases. Constant complications prevented him from doing his job. As a result, he was often considered a liability; others who were not as expert but who could go "outside the wire" were relied on instead. No amount of counseling or rehabilitation was able to cure these deficiencies. With his unit now preparing for yet another deployment, the commander reviews the Soldier's prior duty performance and requirements against his own mission requirements. He simply does not have the time or resources to support this Soldier. Reluctantly, the commander arrives at the inescapable conclusion: this Soldier is non-deployable.

While courts-martial may be non-deployable in their current state, modifying the way military justice is managed on deployments could make courts-martial more portable and relevant in combat. Changes to deployed justice should include emphasizing the need for on-site courts-martial, rightsizing the committee that recommends changes to the UCMJ by jettisoning the CAAF judges, re-thinking the need for certain court-martial rules that were formed blind to their deployed consequences, and following the Navy's example with non-elective nonjudicial punishment when courts are not nearby. The American court-martial system now is quite advanced, but that means little if it is not used where it is needed most.

